84-886 No.

Office Supreme Court, U.S.
FILED
DEC 1 1984
ALEXANDER L. STEVAS

In The

# Supreme Court of the United States

OCTOBER TERM, 1984

JAMES SUNDSTROM SULLIVAN and
HELEN DAWSON SULLIVAN,
*Petitioners,*

*-vs-*

THE FIRST PEOPLES BANK OF NEW JERSEY, THE MARY V. SULLIVAN TRUST FUND, THOMAS E. SUNDSTROM, Trustee, DONALD R. SUNDSTROM, Trustee, HARRY F. SUNDSTROM, Deceased, Trustee, JOHN J. MASTER, JR., ESQ., (A New Jersey Attorney at Law), JOHN J. MARKWARDT, ESQ., (A New Jersey Attorney at law), JANET STUART and SURTEES L. MacKERCHAR, (Trust Officers of the First Peoples Bank of New Jersey),
*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

## PETITION FOR CERTIORARI

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30pp

## QUESTIONS PRESENTED

Did the actions of the U.S. Magistrate, and District Court Judge, deny Petitioners right of trial by jury as demanded in Original Complaint, by dismissing said complaint under *28 USC 636*?

The text of *28 USC 636* is found in the appendix. The text of *Rule 38 FRCP* is found in the appendix. The text of the *U.S. Constitution, Article VII* is found in the appendix.

Did repeated violations of General and Local Rules of the New Jersey Courts by trial judge deprive Petitioners of fair hearing, and opportunity to be heard, in violation of the due process and equal protection clause of U.S. Constitution?

The text of the General Rules, and Local Rules of the United States District Court for the District of N.J. are found in the appendix.

Did United States Court of Appeals err in limiting the present appeal to confined issue of defective service of final order adjudicating all claims with all parties to toll running of time for appeal from District Court to U.S. Court of Appeals?

The text of *Rule 60* is found in the appendix.

Did District Judge err in dismissing cross claim of Thomas E. Sundstrom, Defendant, without notice of ten days under *Rule 56 FRCP*, and without any notice of motion to Petitioners?

The text of *Rule 56 FRCP* is set forth in the appendix.

Did opposing counsel of Petitioners violate rules of service set forth in Local Rules of the Federal Courts of New Jersey?

The text of *Rules 9, 12, 15, 22, 23, 28, and 30*, are set forth in the appendix.

Did defective service of final order adjudicating all claims as to multiple parties deprive Petitioners of right to appeal, and due process and equal protection of the law?

The text of the *Fifteenth and Fourteenth Amendment of the United States Constitution* is set forth in the appendix.

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

NO _____

JAMES SUNDSTROM SULLIVAN and
HELEN DAWSON SULLIVAN,
Petitioners

v.

THE FIRST PEOPLES BANK OF NEW JERSEY, THE MARY V. SULLIVAN TRUST FUND, THOMAS E. SUNDSTROM, Trustee, DONALD R. SUNDSTROM, Trustee, HARRY F. SUNDSTROM, Deceased, Trustee, JOHN J. MASTER, JR., ESQ., (A New Jersey Attorney at Law), JOHN J. MARKWARDT, ESQ., (A New Jersey Attorney at Law) JANET STUART and SURTEES L. MacKERCHAR, (Trust Officers of the First Peoples Bank of New Jersey)
Respondents

(D.C. of N.J. Civil No. 80-1554)

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

James Sundstrom Sullivan, and Helen Dawson Sullivan, husband and wife, the Petitioners above named, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, insofar as it limited the appeal of the Petitioners to the issues presented in the District Court order of November 21, 1983, regarding defective service of the final order of the lower court, and bypassed the merits of the First Appeal to the United States Court

of Appeals, No. 81-1868, and the Second Appeal to the United States Court of Appeals, No. 83-5922. Petitioners petition for a complete review of the procedural defects arising from the actions of the United States Magistrate, the United States District Judge, and the Clerk of the Court, which defects denied the Petitioners of a trial by jury as prayed for in their Original Complaint, and violated their constitutional rights of due process, and equal protection of the law.

## OPINIONS BELOW

The opinions of the United States Court of Appeals for the Third Circuit is set forth in the Appendix attached to wit:


| | Appendix |
|---|---|
| Judgment Order of June 10, 1982, No. 81-1868 before Gibbons, Maris, and Garth, Circuit Judges. | 26a |
| Interlocutory Order Limiting the Second Appeal to Issues presented to the lower court, and restraining judgment on the merits of the Original Complaint, April 19, 1984, No. 83-5922, before John J. Gibbons, Judge. | 35a |
| Order Dismissing the Appeal of Defendant Thomas E. Sundstrom, C.A. No. 84-5367, dated June 18, 1984, for filing the appeal out of time, before Judges Aldisert, Weis, and Becker. | 37a |
| Order affirming the judgment of the District Court of New Jersey, arising from a Memorandum Opinion, before Gibbons, Sloviter, and Van Dusen, Circuit Judges, on September 4, 1984. | 44a |
| Order of the District Court of N.J. denying motion to correct defective service of final order adjudicating multiple claims with multiple parties. November 21, 1983, before Hon. John F. Gerry, U.S.D.J. | 32a |
| Order Dismissing Counterclaims of the Defendants John J. Master, Jr., Esq., and John J. Markwardt, Esq.; and Cross Claim of Defendant Thomas E. Sundstrom, Trustee, before Honorable John F. Gerry, U.S.D.J., on July 14, 1983. | 30a |

Order denying motion to reinstate Original Complaint of the Plaintiffs, before Hon. John F. Gerry, U.S.D.J., combined with denial of motion of Petitioners for partial summary judgment against Defendant Thomas E. Sundstrom, dated and entered July 13, 1983. 29a

Order denying motions of Petitioners to set aside default, and leave to file answers to counterclaims of defendants, along with motion to extend discovery time, and Order incorporating report and recommendation of the United States Magistrate of March 5, 1981 for Dismissal of Original Complaint, before Hon. John F. Gerry, U.S.D.J., on March 16, 1981. 25a

Report and Recommendation of Hon. James F. Hammill, United States Magistrate, dated and entered March 5, 1981, with annexed affidavit of Cosmo A. Giovinazzi, Esq., dated February 6, 1984. 5a

Objections to the Report and Recommendation of the United States Magistrate, (excluding exhibits to original filed) timely filed by Petitioners on March 18, 1981. 14a

Order of State Appellate Court of New Jersey staying sale of Trust Premises, January 18, 1980, before Allcorn, Morgan, and Horn, Appellate Judges, Superior Court of N.J. 1a

Order of State Appellate Court of New Jersey denying stay of sale of trust premises, (recalling Order of January 18, 1980) entered February 6, 1980, before Allcorn, Morgan, and Francis (replacing Horn, J., retired February 1, 1980.) 3a

State Court Probate Order of Settlement, directing sale of trust premises to Petitioner James Sullivan, entered August 29, 1978, before Nathan C. Staller, County Judge, State of N.J. 150a

## JURISDICTION

Jurisdiction of this Court is invoked under *28 USC 1254* from a judgment of the United States Court of Appeals for the Third Circuit, entered on September 4, 1984, which affirmed a judgment of the United States District Court of New Jersey, which lower court entered such order on November 21, 1983.

## STATEMENT OF THE FACTS

This matter was filed as a result of a breached settlement in the Probate Court of the Superior Court of New Jersey, in which the property had been ordered to be sold to the Petitioner Sullivan as part of that settlement (150a). After meeting strict time requirements, the Defendants Donald R. Sundstrom, John J. Markwardt, Esq. refused to go to settlement on December 22, 1978. After setting down another date in January of 1979, the Defendants again refused to attend settlement and pass title, stating that they necessitated more court guidance. Again, in late February of 1979, the Defendants again refused to pass title, and cited the same and identical reason. The Probate Judge had been hospitalized in early February of 1979, and was not due back on the bench until April of 1979. During the interim, the Defendant Thomas E. Sundstrom had been caught in a fire and had leaped three stories with a child on his back to cushion the fall, and suffered multiple breaks in his leg, and othe minor injuries. Being destitute, losing furniture, auto, money, job, and the likes, he was out in the street, and was taken back to Maryland with the Petitioner, until such time, he could apply for trust funds to aid and assist himself. The Defendant 1st Peoples Bank of N.J. refused, through the Defendants MacKerchar and Stuart, and the Defendant Thomas E. Sundstrom was jailed three times during the following months for trespassing and vagrancy. While he had live funds in the 1st Peoples Bank of N.J., the funds were refused to him. After treatment by the corporate trustees, he refused to sign the deed, and as a consequence, the fourth settlement cancelled, and the corporate trustees proceeded to sell the premises. To this effort, the Petitioner appealed the First Intermediate Accounting which had been settled, and upon application, was granted a stay for the sale of the home, pending the full appeal before the Appellate Court. Of the three judge panel, one of the judges retired from the bench, and after the time for ap-

pealing the stay had lapsed, the Defendant Master visited the chambers, ex parte, of the newly installed judge, who operated a recall of the stay, and the premises were ordered sold under the lower court order.

It was then that Petitioners filed suit in the United States District Court, citing a breach of contract in settlement conditions, and with intentional interference with his mortgage application, and subsequent purchase of the premises.

While service of the Original Complaint was perfected, the Defendants filed answers, and a counterclaim for malicious prosecution, and mailed the answer back to Maryland to a Post Office Box which had been closed for some time, and which was not set forth on the complaint and the answers and counterclaims were sent back to the Defendants, who filed defaults on the counterclaims by then forwarding the same to a Post Office Box in N.J., used by Petitioner as a corporation address for his interstate business. The Defendant Thomas E. Sundstrom filed his answer admitting to the claim of the Petitioners, with a further cross claim against the corporate bank, and the trust officers, who refused him assistance in his need. Having been served with the answer of the Defendant Thomas E. Sundstrom, the Petitioners filed a motion for partial summary judgment against the Defendant Thomas E. Sundstrom. A ruling on that was postponed by the trial judge. On the return date of the summary judgment motion, the Petitioner addressed the Court that deposition had just begun, and that notice had been given to attend a pre-trial hearing on January of 198', to which the Court replied to Petitioner that "if you have trouble with that, let me know!" Deposition on oral examination began, and was adjourned until after Christmas, and also that the court reporter was far behind on his assignments. In mid January, 1981, Petitioner moved the court for an extension of time to complete discovery, to which the court responded to a Report and Recommendation of the United States Magistrate arising from a mistaken postponement of a pre-trial hearing, to which counsel for the corporate trustee and the trust officers attended, and Petitioners and Defendant John J. Markwardt, Esq., did not. The Report and Recommendation of the United States Magistrate was served to Petitioners, who had recently moved from Maryland to New Jersey, and the Petitioners responded by filing timely Objections, only to find that the trial judge had entered a dismissal upon the Report and Recom-

mendation of the Magistrate two days before the Petitioners had filed their Objections with affidavits and exhibits. The lone affidavit of counsel for the Defendants was attached to the Report and Recommendation.

An appeal was taken timely to the United States Court of Appeals, and was sent back with instructions that the appeal was defective under rule provided for multiple claims and multiple parties: the counterclaims not having been resolved. This was on June 10, 1982, and was numbered No. 81-1868. After another conference with the United States Magistrate, the Defendants agreed to dismiss their counterclaims. The Defendant John J. Markwardt, Esq. submitted a form order to which petitioners objected, as it did not include the cross claim of the Defendant Thomas E. Sundstrom, which alleged independent jurisdiction under the civil rights titles *(42 USC 1983; 42 USC 1985)*. The trial judge on July 13, 1983, on a Tuesday, in chambers, entered an order denying Petitioners motion to reinstate the Original Complaint. On July 14, 1983, with no notice of motion to any litigant, the trial judge, in chambers, entered an order dismissing the counterclaims without prejudice of the Defendants for malicious prosecution, and further dismissed the cross claim of the defendant Thomas E. Sundstrom, with prejudice, and without costs. Petitioners received no notice of motion, nor any orders entered on July 13, 1983, and July 14, 1983, although the docket entries manifest that notice had been mailed on July 13, 1983 of the Order denying the motion for reinstatement of the original complaint.

Approximately mid September, 1983, Petitioners contacted the Clerk of Court in Camden, N.J. who informed the same that the file was in Trenton, and was in the dead files there: whereupon, a call to the Clerk in Trenton, N.J. led to copies being mailed to Petitioners, who set down the earliest motion date to move the Court to correct the defect in mailing of the orders of July 13, 1983, and July 14, 1983. A call was made to the postmistress of Faulkner, Maryland, who revealed that she had seen a piece of mail like it came from a court, but sent it back as the box was closed some two years before, and 18 months had lapsed in which mail could be forwarded.

Petitioners were denied their motion under *Rule 60 FRCP* to correct the defects in service of process, and to set the time to appeal running as of course. The Appeal to the United States Court of Appeals ensued, at which time, on motion of the Defendants, the ap-

peal was limited to the narrow issues of the order of November 21, 1983, and the Court declined to rule on the merits of the case. On another latitude, the Defendant Thomas E. Sundstrom, having been served with appeal papers by the Petitioners, filed an appeal forma pauperis, and was subsequently dismissed for jurisdictional defects, as the appeal was also untimely filed; that Defendant never having been served with the controlling Order of July 14, 1984, and never having been served with a notice of motion under *Rule 56 FRCP* regarding his cross claim. The Petitioners appeal was also dismissed in that the relief sought under *Rule 60 FRCP* was precluded by the express provision of *FRCP 77(d)*.

The Petitioners seek a review of the procedures of the trial judge, the Clerk of the District Court, and the United States Magistrate, and have the merits of the case sent back to trial by jury, which was demanded in the Plaintiffs' Original Complaint.

## BASIS FOR FEDERAL JURISDICTION

FEDERAL JURISDICTION in the court of first instance was invoked under *28 U.S.C. 1332*, the Plaintiffs being citizens of the State of Maryland, and the Defendants being citizens of the State of New Jersey and/or Pennsylvania, and in the case of Thomas E. Sundstrom, a citizen of a State other than Maryland. The amount in controversy exceeded the sum of ten thousand dollars ($10,000.) exclusive of interest and costs.

FEDERAL JURISDICTION in the court of first instance was invoked by Defendant/Cross Claimant Thomas E. Sundstrom under *28 U.S.C. 1332*, under *28 U.S.C. 1343*, *42 U.S.C. 1983*, and *42 U.S.C. 1985*, as set forth in Defendant/Crossclaimant's jurisdictional paragraph.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

## ARGUMENT

### As to Question One (1)

Did the Actions of the United States Magistrate, and the District Judge, deny Petitioners right of trial by jury as demanded in Plaintiffs' Original Complaint, by dismissing their complaint under *28 USC 636?*

When public officials are charged with the responsibility of protecting the rights of due process, and equal protection of the law, so act in such a capricious, arbitrary, and outright prejudicial manner, they not only derrogate from those rights, but they deny to those individuals their civil rights guaranteed by the Federal Constitution: the right to notice, and the right to have their opportunity to be heard in a court, by a jury of their peers as the trier of the facts. Virtually all citizens, be they public officials, or not, are held answerable and liable for their tortious acts, which constitutes a denial and a deprivation of anothers civil rights. One of the few exceptions, however, has been the immunity granted to our judges, by our judges, and to those whose duties fall within, and under the cover of judicial responsibility. This immunity, well founded on reason and logic, keeps the Courts free to decide, without fear of legal redress, and applies only to the person of the judicial official, so long as the act applied to the immunity, falls within the jurisdiction of the court. The immunity does not apply to the judgment reached by those officials, if the judgment occurs by corrupt and erroneous methods and means used by those immune officials. Those judgments, and the acts preceeding those judgments are not immune, and have always been subject to review and correction of the error and prejudice created by tortious acts of immune officials. It is those errors, and those prejudices to which this Petition of a Writ of Certiorari should be directed, and the specific reasons for the granting of the same.

The subject of their personal immunity is a well settled doctrine. *Bradley v. Fisher, 13 Wall (80 U.S.) 335, 20 L.Ed. 646 (1871); Pierson v. Ray, 87 S. Ct. 1217, 18 L. Ed.2nd (1967); Sullivan v. Kelleher, 405 F. 2nd 486 (1968); Sullivan v. Choquette, 420 F.2nd 674 (1st Cir. 1969) cert denied, Rehearing Den.* The subject of judicial immunity is not the issue here, only the acts committed by those judicially immune public officials, so that the immunity afforded to the person

does not reflect as the immunity which cannot be granted to the effects of those acts committed.

For the purposes of clarity in outline, those errors and prejudices are presented in chronological order to wit:

A. The U.S. Magistrate denied Petitioners an opportunity to be heard as to why they were absent from a pre-trial hearing, and permitted Defendants to file an affidavit, not served for objection or rebuttal, to support the Report and Recommendation for Dismissal as a sanction for missing the pretrial hearing. (9a). The U.S. Magistrate excluded the Defendant John J. Markwardt, Esq., from any form of punishment for being absent from any pretrial hearing, and excluded that fact from his Report and Recommendation. (5a). The punishment meted out and recommended by the United States Magistrate was cruel and unusual punishment, in that the litigation involved a loss of not less than fifty five thousand dollars ($55,000.) in loss of property, and a loss of a primary home. The inequitable treatment was unfair, and unjust, and violated the equal protection clause of the United States Constitution. (69a).

B. Upon filing the Report and Recommendation on March 5, 1981, the U.S. Magistrate sent the Report and Recommendation to the District Judge, who entered an Order of Dismissal, without 10 days notice required by *28 U.S.C. 636*, and *Rule 56 FRCP*, and entered that Order of Dismissal on March 16, 1981. Service of the Report and Recommendation of the Magistrate was not receipted until March 9, 1981 by the Petitioners, by certified mail, and addressed to three addressses (141a) to wit: P.O. Box 634, Ocean City, N.J. 08226, Route 301, Box 205, Newburg, Md. 20664, and P.O. Box 98, Maryland 20632. The same was receipted at all three addresses. The Petitioners filed their 90 page Affidavits and Documentation, with exhibits on March 18, 1981, one full day in time. The order of dismissal (25a) was premature by two full days, and the District Court did not make a de novo determination as required by *28 U.S.C. 636*. The order of dismissal and the Objections to the Report and Recommendation crossed in the mail.

Case law and Statute to support the Petition for the Writ.

*Orand v. U.S., (C.A. Or. 1979) 602 F.2nd 207*
*Aluminium Co. of America, Badin Works, Badin, N.C. v. U.S. Environmental Protection Agency, (C.A.N.C. 1981) 663 F2nd 499*
*U.S. v. Lee Wood Contracting, Inc., D.C. Michigan 1981, 552 F.Supp. 748*
*Sims v. Wyrick, D.C. Mo. 1982 552 F. Supp. 748*
*Williford v. Secretary of Health and Human Services, D.C. Ohio 550 F. Supp. 248*
*Hutchinson v. Schweiker, D.C. Ohio 1982, 535 F. Supp. 962*
*U.S. for the Use and Benefit of Naberhaus-Burke, Inc. v. Butt and Head, Inc., D.C. Ohio 1982, 535 F. Supp. 1153.*

C. The Statute *28 U.S.C. 646* does not give enabling power to the Magistrate to Recommend dismissal of the Plaintiffs Original Complaint for failure to appear for a pretrial hearing, but limits his punitive power to *28 U.S.C. 646(e)*, to constitute a contempt, with a hearing in a summary judgment manner before the District Judge. The entire dismissal proceedings was carried out in an ex parte manner, with no hearing, or opportunity to be heard, and excused the Defendant John J. Markwardt, Esq., for the same offense with impunity.

The Statute *28 U.S.C. 636* is set forth in the appendix at (71a).

**Conclusion**

The Plaintiffs' Original Complaint demanded trial by jury on all counts of the complaint, and the Petitioners were deprived of a jury trial in violation of the *Federal Constitution*, and *Rule 38 FRCP*. The matter should be remanded back to the District Court, with instructions to extend discovery proceedings, and proceed into a jury trial as demanded by the Petitioners in the Plaintiffs' Original Complaint, with leave to amend the Complaint with newly developed factual information running from the time of dismissal.

## As to Question Two (2)

With the same energy and time that was expended by the District Court Judge to keep these issues and merits from a jury, this matter could have been resolved by that jury in less than three days. The dismissal of the Plaintiffs' Original Complaint has consumed time from the date of May 29, 1980 until the present day. It has been to the Court of Appeals on two occasions; the first appeal rejected due to procedural defects (37a) and second appeal for the untimely filing of the notice of appeal, and a refusal of the Court of Appeals to correct defects in service of an order entered by the District Judge, in chambers, on July 14, 1983, which controlled the running of the time to file that notice of appeal.

Petitioners state as the reason for granting a Writ of Certioriari, is that Federal Statutes, and Court Rules have been repeatedly violated to accomplish this dismissal, and the refusal to reinstate the Plaintiffs' Original Complaint for trial by jury. The reasons and motives of the Court are apparent on a bilateral basis; (1) the Petitioners are pro se, and (2) two of the defendants are attorneys at law, who are charged with tortious conduct and activity in the disobedience of a State Probate Court Order, which caused a mortgage commitment to be cancelled, thus causing the Petitioners to lose a trust premises to be sold to them, as part of a settlement in an Estate (150a). Their activities were demanded to be tried before a jury, not before a Magistrate, whose report and recommendation was supported by a lone affidavit, ipsi dixit. This circumstance already prejudices the Petitioners as the visiting team. The Petitioners never consented to an appearance before a U.S. Magistrate (5a); they demanded a jury. Leading case law on the State forum on the subject matter was cited in *Ganger v. Moffett, 8 N.J. 73, 79*, where the State Supreme Court ruled that a vendor ....."unwarrantably refuses to execute the deed the vendee is entitled to recover the amount of money which he has paid on the account of the purchase, and the loss of his bargain, that is, the difference between the market price[1] of the property and the

[1] The purchase price was $25,000, to compensate for $16,900, agreed by the brother beneficiaries to replace the agreement in 1967, when Mary V. Sullivan died testate, and it was agreed that the premises be placed in the individual trust of James Sundstrom Sullivan. The premises appreciated in value by 1979 to over $100,000, due to Casino gambling 8 miles away. The corporate trustee never transferred the property to that trust.



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purchase price, provided by contract, if the jury should find that the market price was in excess of the purchase price. ★★★★★★★★★ citing cases".

These petitioners were kept from that jury in the following manner, manifesting a steady stream of violations of Statutes and Court Rules.

A. A denial of trial by jury under color of *28 U.S.C. 636*, with depositions halted by denial of extension of time, due to reporter being behind schedule. (71a). Denial of motion to set aside default on answer to counterclaims defectively served, by inserting stale Post Office adress in Maryland with physical address, not set forth in summons or complaint.

Case Law and Statutes to support the Petition for the Writ.

*Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S. Ct. 652, 1952*
*Roller v. Holly, 176 US 398, 20 S. Ct. 410, 44 L. Ed. 520*
*Rule 5(b)* Service of Pleadings and Orders (78a)
*Rule 9* of Local Rules of N.J. Federal Courts. Service of Papers (52a).

B. Failure of Trial Judge to Include Disposition of Counterclaims in his Order of Dismissal of March 16, 1981 (25a) causing first Appeal #81-1868 to the United States Court of Appeals, to be remanded back to District Court as an unappealable order (26a), on June 10, 1982. Order of Dismissal drafted by District Judge witout any time to Petitioners to object to form or content required by *Local Rule 22* (56a), causing first appeal to be sent back as unappealable. Matter should have been decided on merits:

Case law and Statutes to support the Petition for the Writ.

*Rule 54 FRCP* Judgments and Costs (82a)
*Local Rule 22 N.J. Federal Rules* Entry of Judgment and Orders. Five days Notice for Objection as to form and context.

C. Upon advice of U.S. Magistrate at second pretrial hearing, Petitioners filed motion for reinstatement of Original Complaint, and was denied by trial judge. Prevailing parties did not submit order under Local Federal Rule, and order sub-

mitted by Plaintiffs inadequate, and trial judge prepared order without service to Plaintiffs for context and form in violation of said Local Rule. No notice ever received by Petitioners on disposition of said motion, although docket entries manifest notice sent. Plaintiffs included a return envelope for their order submitted, stamped and addressed to P.O. Box 634, Ocean City, N.J. 08226. No service of the order of June 13, 1983 ever received by Plaintiffs. Order defectively mailed to P.O. Box 98, Faulkner, Maryland 20632 by Clerk, and sent back to Clerk by Faulkner, Maryland Postmistress citing Box closed. United States Magistrate, in pretrial hearing for special problems on 10/21/82, was fully aware of Petitioners completely moved to New Jersey, and P.O. Box 634, Ocean City, N.J. was mailing address of record.

Case law and Statutes to support the Petition for the Writ

*Local Federal Rule 12*, Motions and Arguments (52a)
*Rule 5(b) FRCP*, Service at Last known address (78a).

## Conclusion

The District Judge denied both Petitioners and Defendant Thomas E. Sundstrom trial by jury, as demanded on issues of fact, by dismissing the original complaint and the cross claim unlawfully, in direct violation of *28 U.S.C. 636, Rule 5 FRCP, Rule 56 FRCP, Local Rule 12 and Local Rule 22* of the New Jersey District Courts. The District Judge furthered the abuse by not setting down the cross claim of Defendant Thomas E. Sundstrom, for a summary judgment motion, giving ten days notice to all parties, for an interpretation of the last will and testament of Mary V. Sullivan, under the civil rights titles, and under *28 U.S.C. 1332*.

**As To Question Three (3)**

Did United States Court of Appeals err in limiting present appeal to confined issue of defective service of final order of July 14, 1983.

Petitioners are beset with more violations of due process and equal protection of the law than is normal for one piece of litigation. There have been two appeals, one dismissed for prematurity under *Rule 54 FRCP*; and the second appeal based on the Clerk's immunity for service of orders under *Rule 77 FRCP*. The Plaintiffs' Original Complaint was dismissed under *28 USC 636*, two full days before a de novo determination could possibly have been made by the trial judge. The dismissal excluded depositions which were being prepared by the court reporter, and not actually filed under the docket entries under June 30, 1981, almost three and one half months later. The docket entries also show that (142a) entries into the docket give the appearance that the objections to the Report and Recommendation are on line 19, filed 3/18/81, and the Order of Dismissal filed on 3/16/84, on line 20. The appearance of the numerical entry on the docket was to give the chronological appearance that the Objections were considered and denied. The situation manifests clear fraud by the Court, and more reasons to grant the Writ.

One of the considerations the Court of Appeals bypassed was that this appeal the second time, essentially was the same appeal as the first time; the arguments were the same, and issues and the applicable law was the same. The only difference was time, and disposing of a counterclaim which had no merit at all, for the counterclaim alleged malicious prosecution by the two attorney defendants. They set forth no jurisdictional paragraph, failed to allege in which prior proceeding they had terminated favorably, and generally could not allege where Petitioners did not have probable cause for a contract and tort action in the United States District Court. There was no reason why the first appeal could not have been decided on the merits. In lieu of this, the appeal was sent back for final orders disposing of multiple claim with multiple parties. Orders were submitted, and Petitioners objected as to form and content. (32a). Notice of motion was filed by Petitioners to reinstate the Original Complaint, citing to the court the violation of *28 USC 646*, in that Plaintiffs' Objections of 80 pages filed April 18, 1983, did not receive a de novo determination by the District Judge, and that the Order of Dismissal was

docketed two days prior, on April 16, 1983. That motion was denied, and the prevailing party did not submit an order. Plaintiffs' anticipated order was inadequate and denied so that under *Local Rule 12 of the N.J. Federal Courts* the burden to submit that order was on the Defendants. In lieu of this, on July 13, 1983, the District Judge formed the order, and the docket entries manifest that notice had been mailed. (142a). Although the Court Clerk had a stamped addressed envelope for convenience addressed to P.O. Box 634, Ocean City, N.J. 08226, the Court chose to mail the same to P.O. Box 98, Faulkner, Md. 20632. The entry of P.O. Box 634, Ocean City, N.J. 08226 on the docket entries manifests that the address has been typewritten out, although mail had repeatedly crossed from the Court to the Petitioners at P.O. Box 634, Ocean City, N.J. 08226. This mailing of the order of July 13, 1983 to Maryland was more than just error and prejudice; it was outright and extrinsic fraud. To support this, with United States mail being forwarded, the Clerk did not take the kindness or trouble to forward this notice on. The same is true for the following Order of July 14, 1983, which controlled the tolling of the time for appeal. That order, according to the Postmistress of Faulkner, Maryland, was sent back to the Clerk of Court. His reasons were obvious, he was trying to thwart the appeal he knew was forthcoming, and on the legal merits, the Petitioners had to prevail.

The real merits of this matter have long been bypassed into legal and manipulative maneuvering. Petitioners had a Probate Court Order to purchase trust premises, which was to have been in the individual trust for James Sundstrom Sullivan. In a settlement in Probate, Sullivan obtained a mortgage, and had financing, and the Respondents refused to convey on three separate occasions, and three submissions of mortgage papers. On the fourth attempt, the Defendant Thomas E. Sundstrom, being brutally treated by the corporate trustees, and their lawyer and officers, refused to convey, and the mortgage application was cancelled. These were jury issues. The United States Court of Appeals has dodged the bullet on the first appeal through needless application of *Rule 54 FRCP*. They avoided the second appeal by rules that Petitioners cannot cure the fraud and deception practiced under *Rule 60 FRCP*. The position of the Petitioners is that the instant matter should never have been before a U.S. Magistrate; that his Report and Recommendation, supported by a lone affidavit was harsh and unjustified; the Order of Dismissal was in error, and

in violation of Federal Statute, and that throughout, the errors and prejudices in notice and opportunity to be heard was overwhelming.

> IT IS TOO LATE IN THE DAY AND ENTIRELY TOO CONTRARY TO THE SPIRIT OF THE FEDERAL RULES OF PROCEDURE FOR DECISIONS ON THE MERITS TO BE AVOIDED ON SUCH MERE TECHNICALITIES. *Forman v. Davis, (1962) 371 U.S. 178, 83 S.Ct. 2279 L. Ed. 2nd 22.*

The Court of Appeals for the Third Circuit has refused to hear the first appeal, No. 81-1868, on the basis of a mere technicality; it has rationalized on the second appeal that the reason for dismissal is that the Clerk, under *Rule 77(d)* is immune from defects in mailing. It did not take into consideration the argument of the Petitioners that no notice of motion was brought for dismissal for Defendant Thomas E. Sundstrom, requiring definite notice, with notice to all parties. While the Clerk may be well immune under *Rule 77(d)*, the District Judge cannot be held free from error and prejudice from notice required under *Rule 56 FRCP* before he entered the order of July 14, 1983, controlling the appeal.

In *Smith v. Jackson Tool and Die, Inc., 5th Cir. 1970 426 F.2nd 5*, the Court upheld vacating and reentry of the judgment under *Rule 60(b)* where the clerk failed to notify the parties. In that case, as in the instant one, the error went further. The trial court in *Smith, supra*, rendered its written Opinion which was sent to counsel for the parties. Counsel for Plaintiff and Defendant expressed their willingness to delay entry, but received no reply to request. The Clerk entered the order, and the clerk failed to give notice. Correspondence from counsel to the judge disclosed that counsel believed that the Court had not yet acted. The trial court made no effort to correct the misapprehension, and the United States Court of Appeals upheld the vacating of the order, and reentry of judgment under *Rule 60(b)*. In the present appeal, the Court of Appeals ruled in reverse. The first appeal of the Sulivans was sent back as untimely in violation of *Rule 54 FRCP*. The second appeal depended upon the entry of an order adjudicating multiple claims with multiple parties. The summary judgment moved by the Sullivans was rendered moot on the Order of

July 13, 1983. The second order required the granting of the motion to voluntarily dismiss the counterclaims, and most importantly, necessitated a motion to dismiss the cross claim of Thomas E. Sundstrom; or a motion to dismiss on the pleadings; his jurisdiction soundly anchored into *42 USC 1983, and 42 USC 1985*, with no objection voiced as to the jurisdictional paragraph. Such motions clearly necessitated a conversion into *Rule 54*, with depositions, requests for admissions, written interrogatories and affidavits. This insertion of the dismissal of Defendant Thomas E. Sundstrom's cross claim to be fused with the order brought on by notice and motion is a direct violation of *Rule 54, FRCP*, requiring ten days notice, to all parties.

This order was entered surreptitiously, quietly, and almost with stealth, and sent down to Maryland, where they knew the service would be defective. The proof that they did not want to perfect service, is the fact that when they received the notices back, they refused and neglected to forward them to the address where they knew it would be perfected, the same address as they permitted the Plaintiffs to be defaulted in their answer to the alleged counterclaims, which the order of July 14, 1983 dismissed.

**Conclusion**

The Court of Appeals for the Third Circuit erred by not ruling on the merits of the appeal, and limiting it to the defective service of the Clerk sending the final order of July 14, 1983 to a stale address in Maryland, two years after the P.O. Box had closed and two years after Petitioners had moved from Maryland to New Jersey. The Writ should issue and after proper review of all of the merits, should be remanded back to the District Court, with a change of venue, and for trial by jury on the issues of fact, as was clearly demanded in the Plaintiffs' Original Complaint.

**As To Question Four (4)**

Trial judge entered order (30a) of July 14, 1983, proportedly to represent final adjudication of multiple claims and parties, without bringing notice of motion under *Rule 56*, giving ten days notice to all parties, dismissed cross claim of Defendant Thomas E. Sundstrom. Trial judge erroneously entered said order without notice of motion required by *Rule 56, FRCP*, arising from *Rule 12 FRCP*, (78a). While prejudicial to Defendant Thomas E. Sundstrom, notice of motion under *Rule 56 FRCP* was also forthcoming to the Plaintiffs. July 14, 1983 fell on a Thursday, and not a regular motion day, as set forth in *Local Federal Rule 12*, which sets down the first Friday, and third Friday in the Camden venue. The trial judge ad libbed the contents and form of the order, and failed to send both the notice of motion, and the order of July 14, 1984. If, under *Rule 77(d)*, the Clerk is not responsible for service of the same, the Court, the Clerk, and opposing parties cannot dismiss a cross claim without notice of motion. Cross claim rested upon independent jurisdiction of *28 U.S.C. 1332*. It was also founded on *42 U.S.C. 1983, and 42 USC 1985*. Defendant Thomas E. Sundstrom was removed by ex parte order, with no notice, or any opportunity to be heard to refuse to sign deed of conveyance, using color of state authority, and in direct violation of *NJS 3A:11-4* (Removal as Trustee for Cause), (50a). The ex parte order of the Superior Court of N.J., Probate Part, was obtained ex parte, by telephone, and entered May 28, 1979, striking out James Sundstrom Sullivan, and Trustee Thomas E. Sundstrom as trustees to convey the deed. The cross claim of Defendant Thomas E. Sundstrom rested on that claim; it was bypassed by the trial judge, when in the Order of July 13, 1983, he ruled that the cross claim was moot, based on the Original Complaint of the Plaintiffs being dismissed.

Case Law, Statutes, and Court Rules to support the Petition for the Writ.

*Rule 13 FRCP* Counterclaim and cross claim
*Rule 12 FRCP* (78a) Defenses, Motion to Dismiss, and on Pleadings
*Rule 56 FRCP* (83a) Summary Judgment
*Rule 12, N.J.* (52a) District Courts Motions and Arguments

*Maggett v. Dalsheim, et als 709 F.2nd 800*
*In Re White Farm Equipt. Co., Ohio 1982, 23 B.R. 85*
*International Ass'n of Machinists v. United Technologies Corp., C.A.*

*Fla. 1983 704 F.2nd 569*
*Townsend v. Columbia Operations, C.A. Cal 1982, 667 F.2nd 844*
*Sick v. Texas Parks and Wildlife Dept., C.A. Texas 1981 644 F.2nd 1056*
*Continental Illinois Nat. Bank and Trust Co. of Chicago v. Burns, D.C. Ill 1982, 552 F. Supp. 113*
*Jones v. Illinois Rehabilitation Services, C.A. Ill 1982 689 F.2nd 724 cert denied 103 S. Ct. 177*
*Travelers Ins. Co. v. 1st Nat. Bank of Shreveport, C.A. La 1982 675 F.2nd 633*

**Conclusion**

The dismissal of the Plaintiffs' Original Complaint was in violation of *28 U.S.C. 636;* the dismissal of the Defendant Thomas E. Sundstrom's Cross Claim was a direct violation of *Rule 12 FRCP, and Rule 56 FRCP*, in that no notice of motion to parties was given by the District Judge, who entered the order of July 14, 1983 on a non-motion day, without a hearing or opposing papers. The docket entries are barren of such notice of motion, or hearing date, and a Writ of Certiorari should issue to review the conduct of the trial judge, and the clerk to correct error and prejudice.

**Questions Five (5) and Six (6)**

Did opposing counsel violate rules of service set forth in Local Rules of Federal Courts of New Jersey? Did defective service of final order adjudicating all claims as to multiple parties deprive Petitioners right to appeal on merits. and a deprivation of due process and equal protection of the law?

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated. under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer, 311 U.S. 457, 61 S. Ct. 339, 85 L.Ed 278, 132 A.L.R. 1357; Grannis v. Ordean, 234 U.S. 385, 34 S. Ct. 779, 58 L.Ed. 1363; Priest v. Board of Trustees of the Town of Las Vegas, 232 U.S. 604, 34 S. Ct. 443, 58 L. Ed. 751; Roller v. Holly 176 U.S. 398 20 S. Ct. 410, 44 L. Ed. 520.* The notice must be of such a nature as reasonably to convey the required information. *Grannis v. Ordean, supra,* and it must afford a reasonable time for those interested to make their appearance. *Roller v. Holly, supra,* ★★★★★★★★★ cutubg cases. But when notice is a persons due, process which is a mere gesture is not due. process. The means employed mycg be such as one desirous of actually informing the absentee might reasonable adopt to accomplish it.
>
> *Mullane v. Central Hanover Bank and Trust Company, 70 S. Ct. 652, 339 U.S. 314, 315.*

Petitioners submit as a strong reason for a Writ of Review to issue is because of the repeated violations of general federal rules. and

local federal rules, the sum total of which is a flagrant violation of due process and fairness in proceedings, and equal protection of those rules designed to safeguard all litigants. The Order of July 14, 1983 was on motion of the defendants to dismiss a counterclaim. Plaintiffs objected to form and content (38a), based on the omission of the disposition of the cross claim of Defendant Thomas E. Sundstrom. The defendants prevailed, and under *Local Rule 12* of the N.J. Federal Court, the

> ..... prevailing party, upon direction of the court, shall submit an order within five days of the ruling on the motion on notice to his or her adversary. Unless otherwise directed by the court, if no objection to that order is received within seven days of receipt by the adversary, the order will automatically be signed by the court. *General Rule 12(c)* (of the District Courts of United States for the District of New Jersey.)

There was no notice of any order, as entered by the district judge on July 14, 1984. It was entered on a non-motion day, a Thursday, and with no notice of motion to dismiss, or for judgment on the pleadings, thereby sending it to summay judgment on *Rule 56 FRCP*. The Local *Rule 12*, was again violated in that the rule states:

> If a motion is noticed for any day other than a regular agreement day, unless such day has been fixed by the court, the clerk shall list the hearing for the next regular argument day and notify all counsel of the change in date. *General Rule 12(c)* (of the District Courts of the United States for the District of New Jersey.)

The trial judge chose to have the motion hearing to dismiss the cross claim of Defendant Thomas E. Sundstrom without any opposition so that no one was invited to that hearing date, nor was anyone allowed to offer any objections. The order of July 14, 1983 was entered, ex parte, and notice allegedly sent to P.O. Box 98, Faulkner, Maryland 20632, where it was returned box closed. Post Office Rules and Regulations offer only one year to forward mail. Mail had repeated-

ly been sent back and forth from the Court to the Sullivans at P.O. Box 634, Ocean City, N.J. 08226. The U.S. Magistrate corresponded with the Sullivans at the above address. The defendants knew it, as they were engaged in consolidated actions of law in the State Court from 1978 to the present day. The defendant attorneys in this matter defaulted the Sullivans in their counterclaim, when mail was sent back defectively from a stale post office address, when defendants took it upon themselves to add that post office box to a correct physical address, and thereby send the Sullivan's mail in disruption.

The truth of this situation is that they didn't want the controlling order of July 14, 1983 properly served. Taking this into consideration, and then applying the rationale of the *Mullane* decision, supra, the due process to be accorded to the Petitioners was denied in that:

1. The notices, if any, of the motion to dismiss the Counterclaims of Thomas E. Sundstrom, were not reasonably calculated to apprise Petitioners of the pendency of the action.

2. The notices, if any, under all of the circumstances, did not meet the formula of *Mullane, supra*, in that Thomas E. Sundstrom lives in Alaska, and mail one way takes seven to nine days, not nearly enough time to file objections, which would take another seven to nine days, let alone the cost and time of travel.

3. The court, the Clerk of Court, and the United States Magistrate, as well as defense counsel all had the corrected and proper address of the Petitioners. They chose to use the means of service most likely to be defective, and not of means actually desirous of informing the absentee to accomplish such service. The alleged notices of July 13, and July 14, 1983 were returned to the Clerk. Why did he not forward them to P.O. Box 634, Ocean City, N.J. 08226. Mail is free to government agencies!

A demand for trial by jury cannot be tossed away ever so unjustly by placing its complicated factual issues before a U.S. Magistrate, under the guise and color of *28 U.S.C. 636*. The Petitioners were not even given the consideration of a de novo determination, when the record attests to over eighty pages of affidavits and documents, with exhibits. With so many factual issues at stake, even summary judgment had to be denied.



BEST AVAILABLE COPY

This matter was concluded by a diabolical judicial scheme of manipulation to circumvent the statutes, and the Rules of Court, not to mention a deprivation of civil and constitutional rights accorded by the Federal Constitution.

Petitioners sought a clean forum upon which to present their action in contract and common law tort against these defendants, including Thomas E. Sundstrom. The blatant and patent errors in procedure and judgment by the District Court, and the refusal of the Court of Appeals for the Third Circuit to hear the issues of law on the merit, and the merits of the case warrants review by this Court.

When research on the first appeal, *NO. 81-1868*, in 1982 there was only one case reported whereby the District Judge was reported to have been reversed. In less than two years, research manifests in excess of twenty five cases, some of which have been set out. It is apparent that District Judges are using this *28 USC 636* to avoid trials, and force matters into settlement. The instant action arose from a breached settlement with great dishonor by these defendants. Those issues are still before the State Court system. It is incumbent upon the Supreme Court of the United States to look back to the grass roots of its judicial system and see just how *28 USC 636* is being tortiously employed by judges who neither understand the issues, or attempt to avoid them by manipulative means. The end result is third class justice, or no justice at all, one being as bad as the other.

## Conclusion

The Writ of Certiorari should issue, not only to place these Petitioners to their status quo demand for trial by jury, but to set down a firm guide that *28 USC 636* is not a substitute for a jury, but to expedite the moving along of cases to be settled as was its design. The review should include that this trial by Jury be held in the furtherest point from the Camden, New Jersey venue to offset the prejudice and influence of local attorneys familiar to the Court, and the always present influence of the 1st Peoples Bank of N.J., and its trust officers.

Respectfully submitted,

by s/J.S.S.
James Sundstrom Sullivan

by s/H.D.S.
Helen Dawson Sullivan

No. 84-886

Supreme Court, U.S.
FILED
DEC 1 1984
ALEXANDER L. STEVAS
CLERK

In The

# Supreme Court of the United States

OCTOBER TERM, 1984

JAMES SUNDSTROM SULLIVAN and
HELEN DAWSON SULLIVAN,
*Petitioners,*

*-vs-*

THE FIRST PEOPLES BANK OF NEW JERSEY, THE MARY V. SULLIVAN TRUST FUND, THOMAS E. SUNDSTROM, Trustee, DONALD R. SUNDSTROM, Trustee, HARRY F. SUNDSTROM, Deceased, Trustee, JOHN J. MASTER, JR., ESQ., (A New Jersey Attorney at Law), JOHN J. MARKWARDT, ESQ., (A New Jersey Attorney at law), JANET STUART and SURTEES L. MacKERCHAR, (Trust Officers of the First Peoples Bank of New Jersey),
*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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# APPENDIX

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## APPENDIX A

## ORDER ON MOTIONS/PETITIONS FILED JANUARY 18, 1980

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

JAMES SUNDSTROM SULLIVAN, TRUSTEE:
VS
THE FIRST PEOPLES BANK OF NEW JERSEY, ETC.,

DOCKET NO. A-1450-79
MOTION NO. M-1884-79
BEFORE PART F

JUDGES: ALLCORN
MORGAN
HORN

MOVING PAPERS FILED JANUARY 8, 1980
ANSWERING PAPERS FILED
DATE SUBMITTED TO COURT JANUARY 16, 1980
DATE ARGUED
DATE DECIDED JANUARY 17, 1980

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

| MOTION/FOR STAY | GRANTED | DENIED | OTHER |
|---|---|---|---|
| | X | | |

SUPPLEMENTAL:

FOR THE COURT:

s/S.A.
SAMUEL ALLCORN, JR., P.J.A.D.

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

Elizabeth McLaughlin

Clerk

WITNESS, THE HONORABLE SAMUEL ALLCORN, JR., PRESIDING JUDGE OF PART F, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 17th DAY OF JANUARY 1980

Elizabeth McLaughlin
CLERK OF THE APPELLATE DIVISION

**APPENDIX B**

**ORDER ON MOTIONS/PETITIONS**
**FILED FEBRUARY 6, 1980**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
JAMES SUNDSTROM SULLIVAN, TRUSTEE, DOCKET NO. A-1450-79
MOTION NO. M-1884-79
BEFORE PART F

VS

THE FIRST PEOPLES BANK OF NEW JERSEY ETC.,

JUDGES: ALLCORN
MORGAN
FRANCIS

| | |
|---|---|
| MOVING PAPERS FILED | JANUARY 8, 1980 & JANUARY 18, 1980 |
| ANSWERING PAPERS FILED | JANUARY 23, 1980 |
| DATE SUBMITTED TO COURT | JANUARY 16, 1980 & FEBRUARY 5, 1980 |
| DATE ARGUED | |
| DATE DECIDED | FEBRUARY 6, 1980 |

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

| MOTION FOR STAY | GRANTED | DENIED | OTHER |
|---|---|---|---|
| | | X | X |

SUPPLEMENTAL:

The Order in the above matter filed January 18, 1980 is recalled and superceded. The Court, having reconsidered the matter, denies the Motion for Stay.

FOR THE COURT:

_____

P.J.A.D.

I hereby certify that the foregoing
is a true copy of the original on file
in my office

Elizabeth McLaughlin

Clerk

WITNESS, THE HONORABLE SAMUEL ALLCORN, JR., PRESIDING JUDGE OF PART F, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 6th DAY OF FEBRUARY 1980

Elizabeth McLaughlin

CLERK OF THE APPELLATE DIVISION

## APPENDIX C

## REPORT AND RECOMMENDATION TO HONORABLE JOHN F. GERRY FILED MARCH 5, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HONORABLE JOHN F. GERRY

JAMES SUNDSTROM SULIVAN and
HELEN DAWSON SULLIVAN,
Plaintiffs,

v.

THE 1st PEOPLES BANK OF NEW JERSEY, THE MARY V. SULLIVAN TRUST FUND, THOMAS E. SUNDSTROM, Trustee, DONALD R. SUNDSTROM, Trustee, HARRY F. SUNDSTROM, Trustee, JOHN J. MASTER, JR., ESQ. (A New Jersey Attorney at Law), JOHN J. MARKWARDT, ESQ., (A New Jersey Attorney at Law), JANET STUART, and SURTEES MacKERCHAR (Trust Officers of the 1st Peoples Bank of New Jersey)
Defendants.

Civil No. 80-1554

## REPORT AND RECOMMENDATION TO HONORABLE JOHN F. GERRY

APPEARANCES:

JAMES SUNDSTROM SULLIVAN, **PRO SE**
P.O. Box 98
Faulkner, Maryland 20632
Plaintiff

COSMO A. GIOVINAZZI, III, ESQUIRE
Tuso, Gruccio, Pepper, Buonadonna,
Giovinazzi & Butler
538 Landis Avenue
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Vineland, New Jersey 08360
Attorneys for Defendants

The 1st Peoples Bank of New Jersey,
The Mary V. Sullivan Trust Fund,
Donald R. Sundstrom, Trustee
Harry F. Sundstrom, Trustee,
John J. Master, Jr., Esquire, etc.,
Janet Stuart and Surtees MacKerchar
(Trust Officers of the 1st Peoples
Bank of New Jersey)

JOHN J. MARKWARDT, ESQUIRE, **PRO SE**
32 North Black Horse Pike
P.O. Box 364
Blackwood, New Jersey 08012
Defendant

THOMAS E. SUNDSTROM, **PRO SE**
G-30 Neshaminy Green Apartments
3000 Ford Road
Bristol, Pennsylvania 19007

HAMMILL, United States Magistrate:

This Report and Recommendation is issued pursuant to 28 U.S.C.A. §636(b)(1) (A) and the General Rules of the United States District Court Paragraphs A)10) and (15), as amended June 16, 1980.

Affidavit of Cosmo A. Giovinazzi, III consisting of six pages and sworn to on February 6, 1981, said Affidavit being prepared at the direction of this Court after the plaintiffs failed to appear at a Pre-Trial Conference scheduled before me on January 29, 1981 at 4:15 P.M. The Affidavit sets forth the complete procedural history and factual background of not only this litigation but the underlying basis for it concerning the sale of a certain property located in Ocean City, New Jersey and more particularly, paragraphs seven and eight clearly indicate that the plaintiffs had notice of the Pre-Trial Conference before me and simply chose not to appear at it. Further, since the date of the conference, January 29, 1981, I have received no communications from the plaintiffs and accordingly it is my report and recommendation that this action be dismissed with prejudice.

Because it appears that the plaintiffs have several addresses, I am directing the Clerk of the Court to mail a copy of this Report and Recommendation by regular and certified mail addressed to the plaintiffs at the following addresses:

(1) P.O. Box 634, Ocean City, New Jersey;

(2) Route #301, Box 205, Newburg, Maryland 20664; and

(3) P.O. Box 98, Faulkner, Maryland 20632

and I am informing the plaintiffs and counsel for the defendants Cosmo A. Giovinazzi, III, Esquire, Tuso, Gruccio, Pepper, Buonadonna, Giovinazzi and Butler, 538 Landis Avenue, P.O. Box 160, Vineland, New Jersey 08360 to whom a copy of this Report and Recommendation is to be sent by regular mail, that they shall have ten days from the date of receipt of this Report and Recommendation to advise Your Honor in writing of any objections which they may have to it and that absent the presentation of such objections, this action may be dismissed with prejudice in Your Honor's discretion. John M. Markwardt, Esquire, **pro se,** 32 North Black Horse Pike, P.O. Box 364, Blackwood, New Jersey 08012 and Thomas E. Sundstrom, **pro se,** G-30 Neshaminy Green Apartments, 3000 Ford Road, Bristol, Pennsylvania 19007 should also be served with a copy of the Report and Recommendation by certified mail and that they also shall have ten days from the date of receipt of this Report and Recommendation to advise Your Honor in writing of any objections which they

may have to it and that absent the presentation of such objections, this action may be dismissed with prejudice in Your Honor's discretion.

Respectfully submitted,

s/J.F.H.

JAMES F. HAMMILL
UNITED STATES MAGISTRATE

Dated: March 5, 1981.

## APPENDIX D

## AFFIDAVIT OF COSMO A. GIOVINAZZI, III, ESQ. DATED FEBRUARY 6, 1981

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Hon. John F. Gerry, U.S.D.J.

Plaintiffs,

JAMES SUNDSTROM SULLIVAN
and HELEN DAWSON SULLIVAN,

vs. Civil Action No. 80-1554

Defendants, AFFIDAVIT

FIRST PEOPLES BANK OF
NEW JERSEY, THE MARY V.
SULLIVAN TRUST FUND,
THOMAS E. SUNDSTROM,
TRUSTEE, DONALD R.
SUNDSTROM, TRUSTEE,
HARRY S. SUNDSTROM,
TRUSTEE, JOHN J. MASTER,
JR., ESQ., JOHN J. MARKWARDT,
ESQ., JANET STUART, and
SURTEES MacKERCHAR.

STATE OF NEW JERSEY

SS.

COUNTY OF CUMBERLAND

COSMO A. GIOVINAZZI, III, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am a member of the law firm of Tuso, Gruccio, Pepper, Buonadonna, Giovinazzi & Butler, PA, attorneys for defendants, First Peoples Bank of New Jersey, the Mary D. Sullivan Trust Fund, Donald R. Sundstrom, Trustee, Harry S. Sundstrom, Trustee, John J. Master, Jr., Esq., Janet Stuart, and Surtees MacKerchar, in the above-entitled action. We have also filed an

Answer on behalf of Thomas E. Sundstrom, Trustee, but were subsequently advised by Mr. Sundstrom that he does not desire the representation of our law firm in this action. Concurrent with that notice, Mr. Sundstrom filed his own Answer to plaintiff's Complaint, in which he admitted all of the allegations of all three Counts.

2. On Thursday, January 29, 1981, I appeared at the U.S. District Court for the District of New Jersey at Camden, NJ, in Room #428, for a preliminary pretrial conference before the Honorable James F. Hammill. I arrived at Room #428 at 4:10 p.m. for the pretrial conference that was scheduled for 4:15 p.m., and remained there in Room #428 and before the Court until 5:30 p.m. At no time did the plaintiff, James Sundstrom Sullivan, pro se, appear to attend the pretrial conference, and at no time did he call or write to me to advise that he would not be in attendance.

3. At the time of my appearance before Judge Hammill, U.S. Magistrate, I advised him of the following facts regarding this case:

A. Plaintiff's action revolves around his efforts to obtain title to premises known as 50 Central Avenue, Ocean City, NJ, which for several years had been titled in the name of the Mary V. Sullivan Trust, of which defendant, First Peoples Bank of New Jersey, is the corporate Trustee. The Will of Mary V. Sullivan provided that her estate was to be used to create four separate trusts, one for each of her sons. Plaintiff is one of her sons, and co-defendants, Donald Sundstrom, Thomas Sundstrom and Harry Sundstrom, are the three remaining sons. The premises known as 50 Central Avenue, Ocean City, NJ remained in the Mary V. Sullivan Trust prior to sale because the premises could not be divided into four parts.

B. On August 29, 1978, a Consent Order was entered in the Cape May County Court, Probate Division, which provided, **inter alia,** that plaintiff, James Sullivan, would have 60 days to purchase the premises known as 50 Central Avenue, Ocean City, NJ, from the Mary V. Sullivan Trust for the sum of $25,000.00. The Order provided that if plaintiff did not obtain financing or otherwise purchase the premises within that time, it was to be sold to a third party in the same manner as other property set forth in said Order.

C. Plaintiff was unable to obtain financing within the 60-day period set forth in the Order, and subsequently sought and received

an extension of the settlement date. Prior to the extended settlement date, plaintiff obtained a report of title which indicated that the premises in question might be titled in Donald Sundstrom, one of the co-trustee/defendants, and sought to purchase the premises from him rather than from the Trust. As a result of the confusion caused by plaintiff's report of title, settlement did not occur by the extended date, and plaintiff sought and received a further extension of settlement to May 16, 1979. Plaintiff failed to appear at the settlement on May 16, 1979, when the corporate trustee and the co-defendants were ready, willing and able to convey title to the plaintiff for the agreed-upon price of $25,000.00. Only co-defendant, Thomas Sundstrom, failed to appear at the settlement, and the attorney for the corporate trustee, John Master, obtained an Order from the Cape May County Court, Probate Division, authorizing the corporate trustee to convey title on behalf of the absent individual trustee.

D. Subsequently, as a result of plaintiff's failure to purchase the premises on the scheduled settlement date, defendants sought to convey said premises to a third party in accordance with the terms of the Court Order of August 29, 1978. Thereafter, plaintiff moved to vacate the aforementioned Court Order, which application was denied by the Cape May County Court. Plaintiff thereupon appealed the decision of the Cape May County Court to the New Jersey Superior Court, Appellate Division, and sought an Order to stay the sale of the premises at 50 Central Avenue to a third party. When plaintiff's application for said Order was denied by the Appellate Division, plaintiff sought and obtained a Temporary Order Restraining said sale from the New Jersey Supreme Court, which Order was later rescinded. Thereafter, plaintiff failed to prosecute his appeal in the New Jersey Superior Court, Appellate Division, and said appeal was dismissed.

E. Subsequently, plaintiff instituted the instant action in the U.S. District Court for the District of New Jersey, seeking to obtain specific performance of the Court Order previously entered in the Cape May County Court, which provided for the sale of the premises to him for the sum of $25,000.00. The Second Count of plaintiff's Complaint seeks damages for failure to convey the premises to him, and for incidental damages allegedly incurred by plaintiff in his attempts to attend settlement and in connection with storage of

furniture. The Third Count seeks punitive damages against several of the defendants for alleged malicious interference with plaintiff's right to buy the premises at 50 Central Avenue pursuant to the Court Order of August 29, 1978. Plaintiff seeks punitive damages in the sum of $1,000,000.00 and claims a conspiracy among certain bank trust officers, individual co-trustee, the attorney who represented the bank in the probate matter, and the attorney for one of the individual co-trustees, John Markwardt, Esq.

3. At the time plaintiff instituted this action, he stated his address on the Summons and in the Complaint as Route 301, Box 205, Newburg, Maryland 20664. The second plaintiff, Helen Dawson Sullivan, indicated in her Affidavit annexed to the Complaint that she resided at the same address.

4. The co-defendants attempted to serve their Answer and Counterclaim upon plaintiffs at the address indicated in the Summons and Complaint, but certified and regular mail were returned to the undersigned attorney, marked "Box Closed--No Order." Subsequently, the undersigned attorney obtained additional addresses for plaintiff from First Peoples Bank, which addresses were known from State actions instituted by plaintiff in the Superior Court of Camden County. One of the addresses previously used by plaintiff was P.O. Box 634, Ocean City, NJ 08226, which address has been utilized by John Master, Esq. as recently as May 16, 1980. The undersigned attorney for the co-defendants sent a copy of the Answer and Counterclaim to plaintiffs at the Ocean City address, with instructions that said mailing was for restricted delivery, and the said Answer and Counterclaim were subsequently delivered on July 17, 1980.

5. On or about September 15, 1980, the undersigned attorney received a letter from plaintiff, listing his address as Route #301, Box 205, Newburg, Maryland 20664, and in said letter plaintiff stated that he would accept service of any pleadings or correspondence at his Ocean City Address, P.O. Box 634, Ocean City, NJ.

6. The notice of pretrial is addressed to plaintiff at P.O. Box 634, Ocean City, NJ, and said pretrial notice sent by the Clerk of the U.S. District Court is dated September 25, 1980.

7. At the time of his deposition on December 9, 1980, plaintiff stated in said deposition that his address was Route 301, Box

205, P.O. Box 98, Faulkner, Maryland 20636 (pg. 7 of plaintiff's deposition, line 11). Subsequently, a letter from the Clerk of the Court regarding a motion made by plaintiff is addressed to plaintiff at P.O. Box 98, Faulkner, Maryland 20632, and papers recently filed in the Superior Court action in Camden County also lists plaintiff's address as P.O. Box 98 Faulkner, Maryland 20632.

8. At the time of the deposition held at our law offices at 538 Landis Avenue, Vineland, NJ on December 9, 1980, there was some discussion off the record regarding the preliminary pretrial conference scheduled for January 29th. During the course of that discussion, plaintiff indicated to myself and to John Markwardt, Esq., who was also present, that he was knowledgable of the pretrial conference but felt that the same ought to be postponed, since discovery would not be completed prior to the date of said conference. At the time of that discussion, it was my impression that plaintiff might seek to postpone the pretrial conference, since he indicated that he was going to move for an extension of the discovery period and subsequently plaintiff made such a motion on or about January 15, 1981.

9 However, plaintiff did not notify me by either telephone or letter of any postponement of the pretrial conference, and upon checking with Judge Hammill's office on January 27, 1981, to inquire about a postponement, I was advised that the conference was still on and that I was expected to be present.

10. Based upon the discussion which took place off the record at plaintiff's deposition on December 9, 1980, I am certain that plaintiff knew of the pretrial conference. I have prepared this Affidavit at the direction of Judge Hammill, U.S. Magistrate, with knowledge that it may be used in support of a recommendation to dismiss plaintiff's Complaint.

s/C.A.G.

COSMO A. GIOVINAZZI, III

Sworn and Subscribed to before me this
6th day of February, 1981.

s/C.A.C.

CAROL A. COCCA
A Notary Public of New Jersey
My Commission expires Jan. 22, 1984

## APPENDIX E

## OBJECTIONS TO THE REPORT AND THE RECOMMENDATION OF JAMES F. HAMMILL, U.S. MAGISTRATE FILED MARCH 18 1984

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HONORABLE JOHN F. GERRY, USDJ

JAMES SUNDSTROM SULLIVAN, and
HELEN D. SULLIVAN,

Plaintiffs

vs. CIVIL ACTION NO. 80-1554

THE 1st PEOPLES BANK OF N.J., ET ALS,

Defendants.

### OBJECTIONS TO THE REPORT AND THE RECOMMENDATION OF JAMES F. HAMMILL, U.S. MAGISTRATE

TO: COSMO A. GIOVINAZZI III, ESQ. 538 Landis Avenue, Vineland, N.J. 08360
JOHN J. MARKWARDT, ESQ. 32 N. Black Horse Pike, Blackwood, N.J. 08012
THOMAS E. SUNDSTROM, PRO SE 701 Morlyn Terr., Ocean City, N.J. 08226

### STATEMENT OF THE CASE

The Honorable James F. Hammill, United States Magistrate, has filed a report and recommendation that the action filed by James and Helen Sullivan be dismissed, based on the findings of fact that the facts set forth in paragraphs seven (7), eight (8), and nine (9) are true, and consequently the action should be dismissed. The following affidavit is designed to counter categorically the misleading state-

ment made by counsel for Defendants. Nowhere in the affidavit, or in the report is it verified that John J. Markwardt, Esq. was present at the pre-trial hearing.

## CATEGORICAL COUNTER-AFFIDAVIT TO COSMO A. GIOVINAZZI, III.

I, JAMES SUNDSTROM SULLIVAN, of full age, and under oath, hereby depose and say that I have read the affidavit of Cosmo A. Giovinazzi, III, Esq., and answer categorically to wit:

1. I concur with paragraph one of the affidavit, and make no exception or any objection thereto.

2. On Thursday, January 29, 1981, I did not appear at the U.S. District Court, Camden, N.J. nor did my wife Helen for a pretrial conference before the Honorable James F. Hammill. In a motion hearing for an extension of time for discovery, and for summary judgment against Thomas E. Sundstrom, I addressed the Court, Gerry J. that a pretrial conference was set down for January 29, 1981, and that the discovery time would run into February 19, 1981. The Court, Gerry J. addressed me to the effect that the matter would be taken off the list, and I left the courtroom with the strong impression and very vivid indication that the matter would be taken off the pre-trial list. I have attended many, many pre-trial conferences, and have participated in many, many pre-trial orders when drafted, and to have a pretrial in the middle of discovery proceedings is paradoxical, as no pretrial order can be distinctly drafted accordingly.

3. In counter to paragraphs A, B, C, D, and E, I set forth objections to wit:

    A. The objection taken to this paragraph is that when the Provident Bank of Philadelphia, Pa. transferred the assets to the merged Vineland National Bank and Trust, the premises of 50 Central Avenue, Ocean City, N.J. was placed, or was to have been placed in the individual trust of James Sundstrom Sullivan, by agreement with all the brother trustee/beneficiaries. In a pseudo accounting filed by the merged 1st Peoples Bank of N.J. the accountant took the premises out of individual trust of James Sundstrom Sullivan to offset an unlawful charge of in excess of fourteen thousand dollars (14,000.) made to the trust in direct violation of *NJS 17:9A-35*. No

accounting was ever filed until July 27, 1978, and Plaintiff was chased from the premises by the Ocean City, N.J. Police on a "criminal trespass" on complaint of Elsye Sundstrom Sullivan and convicted as such without the aid of witnesses of the corporate trustee to protect the property.

B. The order entered on August 29, 1978, was reached by an understanding among all parties that three thousand dollars ($3,000.) was to be paid on back interest due over an eleven year period, and that the premises of 50 Central Avenue, Ocean City, N.J. 08226 was to be sold to James Sundstrom Sullivan for twenty five thousand dollars ($25,000.) The order speaks for itself, but the refutation and its attempts to vitiate that order is the subject matter of the instant suit. I incorporate all of the allegations and affidavits of the Plaintiffs' Original Complaint, and the Answers and affidavits of Thomas E. Sundstrom, and by reference make them part herein, to avoid redundancy.

C. Plaintiffs were able to obtain financing, within the sixty day period but the order which Mr. Giovinazzi speaks and refers was entered on August 29, 1978, and not served until September 12, 1978, consuming six weeks of the eight weeks allowed to obtain a firm committment in writing. As a consequence, a motion for an extension of time to procure said firm committment was placed before the courts and firmly resisted by Defendants. I attach correspondence and the pleading to obtain such extension of time. Such correspondence is set forth attached in chronological order starting with correspondence with the Defendant Master.
Defendants on May 16, 1979 did not have a deed to convey, but presented to Marie Chase, settlement officer of the Chelsea Title and Guaranty Company a blank order proposed to Nathan Staller, JSC and not signed by said judge until May 21, 1979. Thomas Sundstrom failed to appear and has filed papers attesting to his actions. Plaintiffs left word at Chelsea

Title and Guaranty Company in Haddonfield at his real estate office in Pleasantville, N.J., and went to Mainland Motors, Inc., of 717 New Road, Somers Point, N.J. where his second mortgagor was located to await news of a deed being presented. Without a valid deed, the first mortgage would have been impossible, thus making the second mortgage even more impossible. James and Helen Sullivan also had the cash to settle, without the second mortgage, and can be proved before a jury on trial on the facts. The representation that John Master obtained an order on 16th of May, 1979 is a misrepresentation and a falsehood presented to this court to obtain a dismissal in this proceeding. Such order is void in violation of state law, and was obtained ex parte, without notice, and without opportunity to be heard. Such order violates specific terms of the trust instrument, as trustees were removed without notice, and opportunity to be heard, destructive of basic constitutional rights under the last will and testament. Such ex parte must include appointed trustees under State Law, in lieu of the terms set forth therein.

D. It was not the result of plaintiffs' failure to purchase the premises; the premises could not have been conveyed on May 16, 1979, as attorney John J. Master, Jr. Esq., false and fraudulently represented that on May 16, 1979 he had a court order obtained ex parte, when the record clearly reflects that such order was not even executed until five days hence; that is May 21, 1979. Plaintiff moved to vacate the original order based on the fraud perpetrated, and the exclusion of certain terms built into the order subjecting extreme hardship in the procurement of settlement. Also, attorney John J. Master thereupon expressed desire to obtain a **dry settlement** during the interim. In an exchange of mail, and pursuant to a telephone call to the Chelsea Title and Guaranty Company, the mortgage papers with the check for seventeen thousand five hundred dollars ($17,500.) was sent back to the Collective Federal Savings Company in Egg

Harbor, N.J., whereupon a telephone call to such institution was followed by correspondence (attached) that the First Mortgage was cancelled. Plaintiff took an appeal of the denial of the stay of certain provisions of the sale of the premises, and upon the fact that fraud in the procurement was evident by misrepresentations of settlement figures complained of in back interest, and a violation of terms of the last will and testament which defendant Master had the Court impose by denying take back mortgages on individual interests, so as to permit the bank to have liquid cash immediately to invest in their Common Stock of Legal Investments, which gave rise to no interest and a loss of principal as manifested in their accounting, which they had covered up by false entries that the same was into the purchase of certain treasury bills, which Plaintiff, as trustee of his own estate, has discovered in a companion action entitled *Sullivan vs. First Peoples Bank of N.J., et als (Docket L-20772-78).* (Trial by jury is slated on Monday, March 23, 1981).

On application to the Appellate Division, the Trustee Sullivan was granted relief on an emergent order by the Honorable Herbert Horn, JAD, and such order is attached and was limited to a stay of the sale of the premises only, as requested in the pleadings, pending hearing before the panel of Judges. The entire panel, per curium concurred on the stay of the sale, which order is also attached. On February 1, 1980, the Honorable Herbert Horn retired, and was replaced by George B. Francis, who has repeatedly intimidated me in the Courts and threatened me with a violation of the Disorderly Persons Act, when in any action, I have always had an interest. On February 5, 1980, the order of the entire panel was superseded by an order granting the stay of the sale of the premises. I then, along with my wife Helen filed the instant action for causes set forth in the Plaintiffs' Original Complaint, and again incorporate all of the allegations and affidavits set forth therein,

including the affidavit of Simon Waksberg, owner of Mainland Motors, Inc., the second mortgagor. The appeal was dismissed for want of prosecution, and my complaint to Elizabeth McLaughlin, Clerk of the Appellate Division was that I don't feel that Judge Francis is qualified to sit impartially on any matter in which I am involved, due to his manifest hostility.

E. There is no objection to this paragraph of the affidavit of Cosmo A. Giovinazzi, III, Esq. except that specific performance of a court order to convey the premises is moot, as the premises have been sold without any agreement of sale for the price of forty two thousand dollars ($42,000.) when such premises could have been sold for a minimum of seventy five thousand dollars ($75,000.) "as is", and in excess of one hundred thirty five thousand dollars ($135,000.) had the corporate trustee kept the premises in good repair.

3. At the time **Plaintiffs** instituted this action, **they** (including Helen Dawson Sullivan) stated their address on the summons and complaint as Route 301, Box 205, Newburg, Maryland 20664.

4. The co-defendants served their answer and counterclaim on Post Office Box 269, Route 301, Box 205, Newburg, Maryland 20664, and was returned "Box closed-No Order. The Post Office Box 269 was registered to Baby History Plain, Inc., and was closed by the Post Office for failure to pay the bill on January 1, 1979, and said box was sold to awaiting customers who wanted it. All mail was returned to senders addressed to that box, due to no order, although the postmistress knew that Route 301, Box 205 is a physical address of the Thunderbird Professional Building, unrelated to P.O. Box 269, Newburg, Maryland 20664. Attorney and counsel obtained additional addresses from First Peoples Bank of N.J. from companion lititigation, and presumptiously mailed answers to the complaint and counterclaims to an address which had included P.O. Box 269, Newburg, Maryland 20664, which was sent back. The Plaintiffs' income tax return from 1979 was also returned due to the Newburg, Maryland Post Office (Attached as exhibit).

5. No objections to paragraph five (5).

6. The Clerk's Office at Camden, N.J. is well aware of P.O. Box 634, Ocean City, N.J.

7. No objection to Paragraph seven (7), except that Cosmo A. Giovinazzi III, Esq. is still unaware that Box 205, Route 301 is a RFD address (physical) for the Thunderbird Professional Building, Newburg, Maryland 20664. I do not reside in Post Office Box 98, Faulkner, Maryland 20632; I receive mail at that address, and can receive it at Box 205, (U.S.) Route 301, Newburg, Maryland 20664. Any use of P.O. Box 269, Newburg, Maryland 20664 was at the time sent back, according to the Postmistress.

8. Both myself and Mr. Markwardt were knowledgable of an original date of January 29, 1980, and I remarked that to Thomas E. Sundstrom on the date of November 7, 1980, due to my remarking to the court that we had a pretrial conference on January 29, 1981, and the court remarking to the effect that it would be taken off that list. Mr. Markwardt apparently had the same impression, and the record reflects he was not present either.

9. Plaintiff is under the impression that Cosmo A. Giovinazzi III, Esq. knew or apparently suspected that the matter was off the list, and due to this misunderstanding and confusion, called the office of Judge Hammill to verify any postponement, and was told the pretrial conference was still on. At this juncture, Cosmo A. Giovinazzi III, Esq. using misleading silence to obtain a default, when he knew there was remarks made from the bench on November 7, 1980 that the matter would be taken off that pretrial list due to discovery being extended.

10 Based on the discussion it was evident that the attorney Cosmo A. Giovinazzi, III, Esq. was nebulous about pretrial conference, and as a consequence called to verify. His actions stopped there, and neither called me, wrote to me, and apparently did not contact Mr. Markwardt, who was his co-defendant. It is apparent that Mr. Giovinazzi is pressing a default by misleading silence and knew about the pretrial conference being on, and unethically did not pass the information on to obtain this report and recommendation. I have also been informed that he has been in direct contact with Thomas E. Sundstrom and has offered compromises of passing the money obtained in the sale of 50 Central Avenue,

Ocean City, N.J. to Thomas E. Sundstrom, Gail Sundstrom, and Mark Sundstrom. He has made compromises to giving up the Trust of Thomas Sundstrom in exchange for certain things, and has filed his affidavit in the U.S. District Court on February 5, 1981, without sending a copy forthwith to opposing parties, to further misleading silence. He has obtained from Thomas E. Sundstrom certain signed documents permitting him to obtain medical records of Thomas E. Sundstrom. I consider his conduct in this matter as causing any form of settlement almost impossible. I have been involved with almost ninety (90) major pieces of litigation, before juries, and non-jury due to the extreme hazards of my interstate business. My latest was in the State of Florida in the Middle District of Florida, Orlando Division, before the Honorable John Reed, who complimented me, along with opposing counsel for being instrumental in changing Florida law with respect to jailing motorist who could not post bail, and I enclose and attach news clippings which represent how I can handle a jury matter. I suspect that the report and recommendation is a special procedure to keep this matter from reaching a jury, and I most stenuously object to the affidavit of counsel for the 1st Peoples Bank of N.J., John J. Master, Jr., Esq. and others. This matter should be allowed to proceed with discovery, admissions, and summary judgment should be entered against Thomas E. Sundstrom. In addition, Plaintiffs' should be given every right to file answers to counterclaims, which must fall as a matter of law; primarily, due to the fact that all essential elements of malicious prosecution are not present, and secondarily, because Helen Dawson Sullivan, one of the Plaintiffs has never been involved with the Mary V. Sullivan Trust Fund, so that Defendants' counterclaim for that tort could never be present. Helen Dawson Sullivan, along with Plaintiff Sundstrom Sullivan was an aggrieved buyer, who sues as individuals against a trust fund, the corporate trustee of that trust fund, and co-trustees of a trust fund, who made every conceivable move to deter and impede the sale of premises set forth in a court order. These are issues for a jury to decide, not a single judge, and opposing counsel, who seeks a technical escape for his clients. Counsel for the Defendants knows full well from depositions taken that James and Helen Sullivan sue in their capacity as individuals; and that James Sundstrom

Sullivan, as a trustee of the Mary V. Sullivan Trust Fund sought a court order to stay the sale of 50 Central Avenue, Ocean City, N.J. to provide a place for his brother Thomas to reside, in keeping with the intent of Mary V. Sullivan. In addition Trustee Sullivan was denied a stay on the sale of the premises. Had not the interference of a stangely recalled appellate order, on February 5, 1980, after Judge Horn's retirement, this action could not have arisen, as there would have been no grounds. Then, and only then could have Plaintiff taken off his "trustee" hat, and sued as an individual. Defendants have opened an avenue of causes of action by trustees for surcharges in mismanagement, and undersale of the trust property. Had such property been kept in the individual trust of James Sundstrom Sullivan originally, for the agreed transfer; and had the trusts been managed properly, this action would never been brought to bar. The deposition being taken give rise to a motion to amend, whereby the remaindermen have a cause of action; and Plaintiff's Trustee "hat" must be put on again.

## CONCLUSION

The report and recommendation of the Honorable James Hammill should be set aside for the evidental facts in this action, and discovery should proceed as requested. Summary Judgment should be granted against Thomas E. Sundstrom as prayed for, relying on the fact that Trustee Sullivan will better protect the interest of Thomas E. Sundstrom in accordance with the last and testament of the late and most lovable Mary V. Sullivan; and not in accordance to the actions manifestly displayed by the deceit and treachery of the corporate trustee, and their past abuse of him.

s/J.S.S.
James Sundstrom Sullivan

s/H.D.S.
Helen Dawson Sullivan

SWORN TO AND SUBSCRIBED BEFORE ME THIS
17th DAY OF MARCH, 1981

_____

Notary Public of N.J.

My commission expires 3/6/83

## APPENDIX F

## ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED MARCH 16, 1981

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

JAMES SUNDSTROM SULLIVAN and
HELEN DAWSON SULLIVAN,

Plaintiffs,

v.

THE 1st PEOPLES BANK OF NEW JERSEY, THE MARY V. SULLIVAN TRUST FUND, THOMAS E. SUNDSTROM, Trustee, DONALD R. SUNDSTROM, Trustee, HARRY F. SUNDSTROM, Trustee JOHN J. MASTER, JR., ESQ., (a New Jersey Attorney at Law), JOHN J. MARKWARDT, ESQ., (a New Jersey Attorney at Law), JANET STUART and SURTEES MAC KERCHAR (Trust Officers of the 1st Peoples Bank of New Jersey),

Civil Action No. 80-1554

ORDER

Defendants.

WHEREFORE, plaintiffs have brought before the court Motions to Set Aside Default, to File an Answer to the Counterclaim and to Extend the Time for Discovery, and the court having considered the arguments of plaintiffs, pro se, and of counsel for defendants;

It is hereby ORDERED the plaintiffs' motions are denied.

It is FURTHER ORDERED, pursuant to the Report and Recommendation of Magistrate Hammill, filed March 5, 1981, that this action be dismissed with prejudice, without costs.

s/J.F.G.
John F. Gerry, U.S.D.J.

Dated: March 16, 1981.

## APPENDIX G

## JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JUNE 10, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 81-1868

---

JAMES SUNDSTROM SULLIVAN and
HELEN DAWSON SULLIVAN
Appellants

v.

THE 1st PEOPLES BANK OF NEW JERSEY,
THE MARY V. SULLIVAN TRUST FUND,
THOMAS E. SUNDSTROM, Trustee, DONALD R.
SUNDSTROM, Trustee, HARRY F. SUNDSTROM,
Trustee, JOHN J. MASTER, JR., ESQ. (A New Jersey
Attorney at Law), JOHN J. MARKWARDT, ESQ.
(A New Jersey Attorney at Law), JANET STUART,
and SURTEES MacKERCHAR (Trust Officers
of the 1st Peoples Bank of New Jersey)

(D.C. Civil No. 80-1554)

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

---

Submitted Under Third Circuit Rule 12(6)
June 8, 1982
Before: GIBBONS, MARIS AND GARTH, Circuit Judges

JAMES SUNDSTROM SULLIVAN
HELEN DAWSON SULLIVAN
P.O. Box 634
Ocean City, New Jersey 08226

Appellants Pro Se

TUSO, GRUCCIO, PEPPER, BUONADONNA,
GIOVINAZZI & BUTLER, PA
538 Landis Avenue
Vineland, New Jersey 08360

COSMO A. GIOVINAZZI, III, Of Counsel
GIOVINAZZI & DAVID A. SPEZIALI, On the Brief

Attorneys for Appellees

## JUDGMENT ORDER

James Sundstrom Sullivan and Helen Dawson Sullivan appeal from an order dismissing their diversity complaint. It appears that the order did not dispose of two pending counterclaims. Thus the order is not appealable. Fed. R. Civ. P. 54(b).

It is O R D E R E D that the appeal be and is hereby dismissed. No costs.

BY THE COURT,

s/J.J.G.
John J. Gibbons,
Circuit Judge

Attest:

s/S.M.
Sally Mrvos, Clerk

DATED: June 10, 1982

Certified as a true copy and issued in lieu
of a formal mandate on July 2, 1982.

Test: M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of
Appeals for the Third Circuit

## APPENDIX H

## ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED JULY 13, 1983

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

JAMES SUNDSTROM SULLIVAN and
HELEN DAWSON SULLIVAN,
Plaintiffs,

v. Civil Action No. 80-1554

FIRST PEOPLES BANK OF NEW
JERSEY, et al, ORDER
Defendants.

This matter coming before the court on plaintiffs' motion to reinstate their complaint; and

The court having considered the submissions and the record, and for good cause shown;

It is, this 12th day of July, 1983, hereby ORDERED that the motion is denied and that plaintiffs' motion for partial summary judgment against defendant Thomas E. Sundstrom is moot by virtue of the dismissal of plaintiffs' action with prejudice on March 16, 1981.

s/J.F.G.
JOHN F. GERRY, U.S.D.J.

## APPENDIX I

## ORDER DISMISSING COUNTERCLAIMS AND CROSSCLAIM OF DEFENDANTS FILED JULY 14, 1983

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

JAMES SUNDSTROM SULLIVAN and
HELEN DAWSON SULLIVAN,
Plaintiffs,

vs.. Civil Action No. 80-1554

FIRST PEOPLES BANK OF NEW JERSEY THE MARY V. SULLIVAN TRUST FUND, THOMAS E. SUNDSTROM, Trustee, DONALD R. SUNDSTROM, Trustee, JOHN J. MASTER, JR., ESQ. (a New Jersey attorney at law), JOHN J. MARKWARDT, ESQ. (a New Jersey attorney at law), JANET STUART AND SURTEES MAC KERCHAR (Trust Officers of First Peoples Bank of New Jersey),

ORDER DISMISSING COUNTERCLAIMS AND CROSSCLAIM OF DEFENDANTS

Defendants.

This matter coming before the Court as a result of pretrial conferences held before the Honorable James F. Hammill, United States Magistrate, on October 18, 1982 and January 25, 1983 respectively, and the defendants who have filed counterclaims in this action, First Peoples Bank of New Jersey, John J. Master, Esq., and John J. Markwardt, Esq., having expressed a desire to dismiss their counterclaims, without prejudice, and the plaintiff James Sundstrom

Sullivan having filed an Affidavit dated February 18, 1983, with annexed Exhibit, by which it appears that the defendant Thomas E. Sundstrom was aware of the pretrial conference of January 25, 1983, and it further appearing that the defendant Thomas E. Sundstrom has not participated in this litigation since the hearing on November 7, 1980, and it appearing to the Court that plaintiff's action was dismissed with prejudice by Order dated March 16, 1981, and that the dismissal of all counterclaims and crossclaims would terminate the entire action;

It it, on this 12th day of July, 1983, ORDERED, that the respective counterclaims of the defendants, First Peoples Bank of New Jersey, John J. Master, Esq., and John J. Markwardt, Esq., being all of the counterclaims filed in this action, are hereby dismissed without prejudice and without costs and that the crossclaim of the defendant Thomas E. Sundstrom, being the only crossclaim filed in this action, is hereby dismissed with prejudice and without costs.

s/J.F.G.
JOHN F. GERRY, U.S.D.J.

## APPENDIX J

## ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED NOVEMBER 21, 1983

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

JAMES SUNDSTROM SULLIVAN
and HELEN DAWSON SULLIVAN,
Plaintiffs,

v. Civil Action No. 80-1554

FIRST PEOPLES BANK OF NEW JERSEY, et al, ORDER

Defendants.

This matter having come before the court on plaintiffs' motion pursuant to Rule 60(a); and

The court having considered the submissions and the record, and for good cause shown;

It is, this 18th day of November, 1983, hereby ORDERED that the motion is denied.

s/J.F.G.
JOHN F. GERRY, U.S.D.J.

## APPENDIX K

## LETTER OF APRIL 19, 1984 WITH ATTACHED CONFORMED COPY OF ORDER DATED APRIL 2, 1984

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

SALLY MRVOS
CLERK

TELEPHONE
215-597-2995

FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106 - 1790

Mr. James Sundstrom Sullivan
Ms. Helen Dawson Sullivan
P.O. Box 634
Ocean City, NJ 08226

April 19, 1984

Re: James Sundstrom Sullivan, et al., Appellants
vs.
The 1st Peoples Bank of New Jersey, et al.
(N.J.D.C. Civil No. 80-1554)

No. 83-5922

Dear Ms. Sullivan and Mr. Sullivan:

Enclosed herewith is conformed copy of order entered by the Court today in the above-entitled case which reads as follows:

> "On foregoing motions it is ordered that the appeal be and is limited to the issues presented in the order of November 21, 1983, that the motion for extension of time to brief the remaining issues is granted, and that the attorney fees motion be referred to the merits panel."

In light of the above Court's order, the appellees' brief is due to be filed within 30 days from this date, on or before **May 19, 1984.**

Very truly yours,
SALLY MRVOS, Clerk

By: s/Frances R. Matysik, Deputy Clerk

FM:ad/dt
Enclosure
cc: Cosmo A. Giovinazzi, III, Esq. (w./encl.) Tuso, Gruccio, Pepper, Giovinazzi & Butler
P.O. Box 160
Vineland, NJ 08360

John J. Markwardt, Esq. (w/encl.)
P.O. Box 364
Blackwood, NJ 08012

CPS-150

April 2, 1984

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C. A. No. **83-5922**

JAMES SUNDSTROM SULLIVAN and HELEN DAWSON SULLIVAN

vs.

THE 1st PEOPLES BANK OF NEW JERSEY, THE MARY V. SULLIVAN TRUST FUND, THOMAS E. SUNDSTROM, Trustee DONALD R. SUNDSTROM, Trustee HARRY F. SUNDSTROM, Trustee JOHN J. MASTER, JR., ESQ. (A New Jersey Attorney at Law), JOHN J. MARKWARDT, ESQ. (A New Jersey Attorney at Law), JANET STUART, AND SURTEES MacKERCHAR (Trust Officers of the 1st Peoples Bank of New Jersey)

(D.N.J. Civ. No. 80-1554)

Present: GIBBONS, HUNTER & GARTH, **Circuit Judges**

Submitted by appellees are:

1. "Notice of Motion to Dismiss Appeal, Limit Record on Appeal, for Costs and Attorneys Fees and Proof of Service;
2. "Brief in Support of Motion to Dismiss Appeal, Limit Record on Appeal, For Costs and Attorneys Fees;
3. "Brief of First Peoples Bank of New Jersey in Support of Motion to Dismiss Appeal, Or to Limit Issues and Record on Appeal; and
4. Mr. Giovinazzi's letter to the Clerk, dated March 16, 1984, which the Court may wish to treat as a motion for enlargement of time to 30 days after denial of motion to dismiss.

Submitted by appellants are:

1. "Reply Brief and Objections to the Motion to Dismiss Appeal by Defendant John J. Markwardt"; and,
2. "Reply Brief and Objections to the Motion to Dismiss by 1st Peoples Bank of N.J., Master, Stuart and Mackerchar"

in the above-captioned case.

Respectfully,

Sally Mrvos (LL)

Clerk

SM/LL/ls
enc.

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On foregoing Motions it is ordered that the appellee be and is limited to the issue presented in the order of November 21, 1983, that the motion for extension of time to brief the remaining issues is granted, and that the attorney fees motion be referred to the merits panel.

By the Court,

John J. Gibbons, Judge

Dated: April 19, 1984

## APPENDIX L

## DEFENDANT THOMAS E. SUNDSTROM'S APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JUNE 18, 1984

APS - 196 June 18, 1984

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C. A. No. 84-5367

JAMES SUNDSTROM SULLIVAN and HELEN DAWSON SULLIVAN

vs.

THE 1st PEOPLES BANK OF NEW JERSEY, THE MARY V. SULLIVAN TRUST FUND, THOMAS E. SUNDSTROM, Trustee, DONALD R. SUNDSTROM, Trustee, HARRY F. SUNDSTROM, Trustee JOHN J. MASTER, JR., ESQ. (A New Jersey Attorney at Law), JOHN J. MARKWARDT, ESQ., (A New Jersey Attorney at Law), JANET STUART AND SURTEES MacKERCHAR (Trust Officers of the 1st Peoples Bank of New Jersey)

(D.N.J. Civ. No. 80-1554)

Present: ALDISERT, **Chief Judge,** WEIS and BECKER, **Circuit Judges**

Submitted by the Clerk for possible dismissal due to a jurisdictional defect

is the above-captioned case.

Respectfully,

Sally Mrvos (JD)

Clerk

SM/JD/ls
enc.

The foregoing "Defendant Thomas E. Sundstrom's Appeal"

THE APPEAL IS DISMISSED FOR
LACK OF JURISDICTION. Untimely filed

By the Court,

Chief Judge

Dated: June 27, 1984

dt/cc: Mr. Tes
(Mr. JSS
(Ms. HDS
CAG, III

## APPENDIX M

## MOTION OF JOHN J. MARKWARDT, ESQ., TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JUNE 19, 1984

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-5922 June 19, 1984

JAMES SUNDSTROM SULLIVAN, et al, Appellants

vs.

THE 1st PEOPLES BANK OF N.J., et al.

To: CLERK

1. Letter dated June 12, 1984, from John J. Markwardt, Esquire, appellee pro se, requesting that the Court not consider appellants' reply brief in its determination of the appeal, and for leave to strike appellant's reply brief,

in the above-entitled case.

Respectfully,

s/Valerie Young

Deputy Clerk

vy

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The foregoing Motion is referred to the merits panel for disposition.

For the Court,

s/Sally Mrvos

Clerk

Dated: June 21, 1984 vy

(JSS
(HDS
CAG, III
JJM

## APPENDIX N

## MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5922

JAMES SUNDSTROM SULLIVAN and
HELEN DAWSON SULLIVAN,
Appellants

v.

THE FIRST PEOPLES BANK OF NEW JERSEY,
THE MARY V. SULLIVAN TRUST FUND,
THOMAS E. SUNDSTROM, Trustee, DONALD R. SUNDSTROM, Trustee, JOHN J. MASTER, JR., Esq.
(A New Jersey Attorney at Law), JOHN J. MARKWARDT, Esq.
(A New Jersey Attorney at Law), JANET STUART
and SURTEES MacKERCHAR (Trust Officers of the
1st Peoples Bank of New Jersey)

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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(D.C. Civil No. 80-1554)
District Judge: Hon. John F. Gerry

Submitted Under Third Circuit Rule 12(6)
August 24, 1984
Before: GIBBONS, SLOVITER and VAN DUSEN, Circuit Judges

(Opinion Filed: )

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MEMORANDUM OPINION OF THE COURT

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GIBBONS, Circuit Judge:

James Sundstrom Sullivan and Helen Dawson Sullivan, his wife, appeal from an order of the district court, dated November 21, 1983, denying their Fed. R. Civ. P. 60(a) motion for relief from prior orders dismissing their complaint and crossclaim. The motion was not made within the time permitted by Fed. R. App. P. 4(a). The ground relied on for relief under Rule 60(a) is the failure of the district court clerk to give appellants notice of the entry of the prior orders. Relief under Rule 60 on that ground is precluded by the express provision of Fed. R. Civ. P. 77(d). The order denying Rule 60(a) relief will, therefore, be affirmed.

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TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

John J. Gibbons

Circuit Judge

## APPENDIX O

## JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 4, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5922

JAMES SUNDSTROM SULLIVAN and
HELEN DAWSON SULLIVAN,
Appellants

v.

THE FIRST PEOPLES BANK OF NEW JERSEY,
THE MARY V. SULLIVAN TRUST FUND,
THOMAS E. SUNDSTROM, Trustee, DONALD R.
SUNDSTROM, Trustee, JOHN J. MASTER, JR., Esq.
(A New Jersey Attorney at Law), JOHN J. MARKWARDT,
Esq. (A New Jersey Attorney at Law), JANET STUART
and SURTEES MacKERCHAR (Trust Officers of the
1st Peoples Bank of New Jersey)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 80-1554)
District Judge: Hon. John F. Gerry

Before: GIBBONS, SLOVITER and VAN DUSEN, Circuit Judges

## JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6) on August 24, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered November 21, 1983 be and the same is hereby affirmed.

Costs are taxed against appellant.

Attest:

Sally Mrvos

Clerk

September 4, 1982

Certified as a true copy and issued in lieu
of a formal mandate on September 26, 1984.

Test: M. Elizabeth Ferguson
Chief Deputy Clerk, U.S. Court of
Appeals for the Third Circuit

## APPENDIX P

## LETTER DATED SEPTEMBER 25, 1980 FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY RE: PRE-TRIAL CONFERENCE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Camden, New Jersey

James S. Sullivan
P.O. Box 634
Ocean City, N.J. 08226

HONORABLE JOHN F. GERRY

DATE: September 25, 1980.
(Jury)

Tuso, Gruccio, Pepper, Buonadonna, Giovinazzi & Butler, Esqs.
538 Landis Ave.
Vineland, N.J.

John J. Markwardt, Esq.
32 N. Black Horse Pike
Blackwood, N.J. 08012

Civil 80-1554
James S. Sullivan, et al v. 1st Peoples Bank, etc., et al

Dear Counsel:

This matter has been set down for a preliminary pre-trial conference before the Honorable James F. Hammill on Thursday, January 29, 1981, at 4:15 P.M., in Room 428 of the United States Courthouse and Post Office Building, Camden, New Jersey 08101.

The attorneys appearing at the conference must be thoroughly familiar with the case and prepared to conduct serious discusssions of settlement. If settlement is not reached, Judge Hammill will, after consultation with the attorneys, enter an Order which will among other things:

(1) Set a firm date for completion of all discovery (the 90-day discovery period will be extended by him only if it is shown that there has been a good faith effort to meet the requirements of Local Rule 15A and that there are good reasons for granting additional time);

(2) Set a date for a final pre-trial conference;

(3) Require the preparation of a comprehensive joint pre-trial order to be submitted to Judge Hammill five days before the final pre-trial

conference; and

(4) Set a date when the case will be listed for trial.

Very truly yours,

ANGELO W. LOCASCIO, CLERK

By: Patrick H. Ronga,
Deputy Clerk

cc: Honorable James F. Hammill
United States Magistrate

UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEW JERSEY

NOTICE OF RIGHT TO CONSENT TO DISPOSITION OF A CIVIL CASE BY A FULL-TIME UNITED STATES MAGISTRATE

In accordance with the provisions of 28 U.S.C. §636(c), you are hereby notified that the full-time United States Magistrates of this District Court, upon the consent of all parties in a civil case, may conduct any or all proceedings in a civil case, including a jury or non-jury trial, and order the entry of a final judgment. **Copies of appropriate consent forms for this purpose are available from the Clerk of the Court.**

You should be aware that your decision to consent, or not to consent, to the referral of your case to a United States Magistrate for disposition is entirely voluntary and **should be communicated solely to the Clerk of the District Court.** Only if all the parties to the case consent to the reference to a Magistrate will either the Judge or Magistrate to whom the case has been assigned be informed of your decision. The consent form shall be filed with the Clerk of the Court within fifteen (15) days after the date of the final pre-trial conference.

Your opportunity to have your case disposed of by a Magistrate is subject to the calendar requirements of the court and the availability of a Magistrate. Accordingly, the District Judge to whom your case is assigned must approve the reference of the case to a Magistrate for disposition.

You are further advised that in the event that all the parties consent to trial by the Magistrate, an appeal from the final judgment may be taken directly to the Court of Appeals or to the District Judge assigned to the action in accordance with the preference of all the parties as indicated on the consent form.

Consent to Disposition of
Civil Case by a Magistrate

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEW JERSEY

Plaintiff

vs. Docket No._____

Defendant

**CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE**

In accordance with the provisions of 28 U.S.C. §636(c), the parties to the above-captioned civil matter hereby waive their right to proceed before a judge of the United States District Court and consent to have a United States Magistrate conduct any and all further proceedings in the case (including the trial) and order the entry of judgment.

_____

_____

Any appeal shall be taken to the United States Court of Appeals for this judicial circuit, in accordance with 28 U.S.C. §636(c)(3), unless all parties further consent, by signing below, to take any appeal to a judge of the district court, in accordance with 28 U.S.C. §636(c)(4).

_____

_____

NOTE: **Return this form to the Clerk of Court only if it has been executed by all parties to the case. Do not return this form to a District Judge or Magistrate.**

## APPENDIX Q

## NEW JERSEY STATUTES

3A:11-4 FIDUCIARIES

3A:11-4. Removal for cause

The court to which a fiduciary is accountable, may remove him from office when:

a. After due notice of an order or judgment of the court so directing, he neglects or refuses, within the time fixed by the court, to file an inventory, render an account or give security or additional security;

b. After due notice of any other order or judgment of the court made under its proper authority, he neglects or refuses to perform or obey the same within the time fixed by the court; or

c. He has embezzled, wasted or misapplied any part of the estate committed to his custody, or has abused the trust and confidence reposed in him; or

d. He (1) has removed from the state or does not reside therein and (2) neglects or refuses to proceed with the administration of the estate and perform the duties and trusts devolving upon him; or

e. He is of unsound mind or mentally incapacitated for the transaction of business; or

f. 1 of 2 or more fiduciaries has neglected or refused to perform his duties or to join with the other fiduciary or fiduciaries in the administration of the estate committed to their care whereby the proper administration and settlement thereof is or may be hindered or prevented.

3A:6-49. Trustee's death or failure to act; appointment of new trustee by court

When a trustee appointed by a will probated in the surrogate's or county court of any county or a trustee appointed under a trust inter vivos as to real or personal property situate in any county fails or refuses to act or dies before the execution or completion of the trust committed to him, or absconds or removes from this state, is adjudicated a mental incompetent or becomes in any manner legally incapable of executing the trust, the county court of the county or

the superior court may remove the trustee, if he be alive, and appoint a suitable person or persons to execute the trust, and the trustee or trustees so appointed shall be entitled to the trust estate as fully and in the same manner as the original trustee was and shall have all the power of the original trustee.

## APPENDIX R

## RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

### RULE 9 SERVICE OF PAPERS

A. Service of all papers requiring service under these rules may be made in the manner specified in Rule5(6), Federal Rules of Civil Procedure. If any paper is served by delivery of a copy, the delivery may be performed by any person of suitable age and discretion, unless otherwise expressly provided in the Federal Rules of Civil Procedure.

B. Except where otherwise provided by these rules (or the Federal Rules of Civil Procedure), proof of service of all papers required or permitted to be served shall be filed in the clerk's office promptly and in any event before action is taken thereon by the court or the parties. The proof shall show the date and manner of service and may be written acknowledgment of service, by certificate of a member of the bar of this court, by affidavit of the person who served the papers, or by any other proof satisfactory to the court. Failure to make the required proof of service does not affect the validity of the service, and the court may at any time allow the proof of service to be amended or supplied unless it clearly appears that to do so would result in material prejudice to the substantive rights of any party.

C. The Clerk is authorized to sign and enter orders specially appointing persons other than the United States Marshal to serve process pursuant to Rule 4(c) of the Federal Rules of Civil Procedure.

### GENERAL RULES

### RULE 12 APPLICATIONS; MOTIONS AND ARGUMENTS

A. Applications for orders to show cause, and for consent and ex parte orders shall be made by leaving the proposed orders and supporting papers with the clerk, who shall deliver each application to the judge to whom the case has been assigned. No order to show cause to bring on a matter for hearing will be granted except on a clear and specific showing by affidavit of good and sufficient reasons why procedure other than by notice of motion is necessary.

B. All applications for provisional remedies or a writ of habeas

corpus or any other emergent relief may be made at any time to the judge to whom the case has been assigned.

C. All other applications by way of motions or otherwise shall be made on a regular argument day to the judge to whom the case has been assigned.

Except during vacation periods of the court, the regular argument days are: Camden, the first and third Friday of each month; Newark, the second and fourth Monday of each month; Trenton, the first and third Monday of each month. Unless the court directs otherwise, it will convene at 10:00 A.M. on argument days. Whenever a regular argument day falls on a holiday, the argument will be heard on the following secular day except in Camden where it will be heard on the preceding secular day.

Unless otherwise ordered by the court, the return day of all motions shall not be later than the second available motion day subsequent to the filing of the motion.

If a motion is noticed for any day other than a regular argument day, unless such a day has been fixed by the court, the clerk shall list the hearing for the next regular argument day and notify all counsel of the change in date.

No appplication will be heard unless the moving papers and a brief prepared in accordance with general rule 27, or a statement that no brief is necessary and the reasons therefore, and proof or acknowledgment of service of the brief or statement and the moving papers on opposing counsel are received at the clerk's office at the place of allocation of the case at least 24 days prior to the date noticed for argument. The brief should be a separate document for submission to the court, not attached to the moving papers, and shall note the date for argument on the cover page. No argument in opposition to the application will be heard unless an answering brief, specifying the date for argument on the cover page, or a statement that no brief is necessary and the reasons therefore, with proof or acknowledgment of service thereof on opposing counsel is received at the clerk's office at the place of allocation of the case at least 14 days prior to the date originally noticed for argument, unless the court otherwise orders. If the moving party chooses to submit a reply brief, that brief, specifying the date for argument on the cover page, with proof or acknowledgment of service thereof on opposing counsel must be

delivered to the clerk's office at the place of allocation of the case at least 7 days prior to the date originally noticed for argument, unless the court otherwise orders. Immediately on receipt of briefs, the clerk shall deliver them to the judge to whom the case has been assigned, except that the clerk will reject any brief not received within the time specified by this rule unless otherwise ordered by the court.

All motions filed shall have annexed thereto a proposed order. The clerk shall not accept for filing any motion not accompanied by a proposed order. In the event the proposed order is not adequate, the prevailing party, upon direction of the court, shall submit an order within five days of the ruling on the motion on notice to his or her adversary. Unless otherwise directed by the court, if no objection to that order is received within seven days of receipt by the adversary, the order will automatically be signed by the court.

D. No application will be entertained by a judge in any action until it has been filed, allocated and assigned.

E. Defenses or objections permitted pursuant to Rules 12 and 41 (e), Federal Rules of Criminal Procedure, shall be made before pleading or within thirty days thereafter unless the court at the time of arraignment, on application of counsel, otherwise specifies, or unless good cause is shown.

F. On motions for summary judgment, the briefs of each side must furnish a statement of genuine issues; stating material facts as to which there exists or does not exist a genuine issue.

G. No motion pertaining to discovery shall be received by the Clerk for filing unless it is accompanied by an affidavit certifying that the moving party has conferred with counsel for the opposing party in an effort in good faith to resolve by agreement the issues raised by the motion without the intervention of the court and has been unable to reach such agreement. If part of the issues raised by motion have been resolved by agreement the affidavit shall specify the issues so resolved and the issues remaining unresolved.

H. Upon filing of a motion for leave to file an amended complaint or answer, a complaint in intervention, or other pleading requiring leave of court to file, the movant shall attach to the motion a copy of the proposed pleading or amendments and retain the original until the court has ruled on the motion. If leave to file is granted, the movant shall file the original forthwith.

I. A motion for re-argument shall be served and filed within 14 days after the filing of the court's order or judgment on the original motion. There shall be served with the notice a memorandum, setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked. No oral argument shall be heard unless the court grant the motion and specifically directs that the matter shall be re-argued orally. As Amended October 6, 1972, effective November 1, 1972.

J. Application for Attorney's Fees and Petitions for Leave to appeal determination of attorney's fees under the provisions of the Equal Access to Justice Act. This rule implements the provisions of the Equal Access to Justice Act, Public Law 96-481,94 Stat. 2325 (1980)

(a) Application for attorney's fees and expenses under 28 U.S.C. 2412(d)(1)(B), as amended.

(1) A party applying for an award of attorney's fees and expenses under the Equal Access to Justice Act shall submit the required information on Form AO 291. Said form is available at the Clerk's Office.

(2) A party applying for fees and expenses shall identify the specific position of the government which the party alleges was not substantially justified.

(b)Petition for Leave to Appeal under 5 U.S.C. 504(c)(2).

(1) A petition for leave to appeal an agency fee determination, pursuant to 5 U.S.C. 504(c)(2), shall be filed with the Clerk of the District Court, within thirty (30) days after the entry of the agency's order with proof of service on all other parties to the agency's proceedings.

(2) The petition shall contain a copy of the order to be reviewed and any findings of fact, conclusions of law and opinion relating thereto, a statement of the facts necessary to an understanding of the petition, and a memorandum showing why the petition for permission to appeal should be granted. An answer shall be filed within (30) days after service of the petition, together with a reply memorandum. The application and any answer shall be submitted without further briefing and oral argument unless otherwise ordered.

(3) Appeals to review fee determinations otherwise contemplated by the Equal Access to Justice Act must be filed pur-

suant to the applicable statutes and rules of this Court.

RULE 15 DISCOVERY

A. All proceedings under Rules 26, 30, 31, 33, 34 and 35 of the Federal Rules of Civil Procedure shall be completed within 90 days of the date of issue joined, unless for good cause shown the period is extended by order of the court. The provisions of this rule shall not preclude the further use of discovery proceedings, on order of the Court, either before or after the entry of judgment.

B. Discovery Materials Not Be Filed Unless Ordered or Needed.

Depositions upon oral examination and interrogatories, requests for documents, requests for admission and answers and responses thereto are not to be filed unless on order of the Court or for use in the proceedings. All such papers must be served on other counsel or parties entitled to service of papers filed with the clerk. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the Court if needed or so ordered.

C. The following provisions of Rule 15 are applicable to parties making application for pre-trial relief from section B, above:

(1) Pre-trial motions regarding discovery proceedings should have annexed thereto copies of only those pertinent portions of the interrogatories, demands for admissions and responses, etc., which are the subject matter of the motion.

(2) Upon the granting of an application to file depositions and on receipt of a sealed deposition, the Clerk shall open it and file it in the open case file unless otherwise ordered.

(3) It shall be the duty of the party on whose behalf the deposition was taken to make certain that the officer before whom it was taken has delivered it to said party for preservation and delivery to the court as required by Rule 30(f)(1),F.R.C.P. if needed or so ordered.

RULE 22 ENTRY OF JUDGMENTS AND ORDERS

A. In all cases in which the clerk is required to prepare the judgment pursuant to Rule 58(1),F.R.C.P., it shall be submitted to the court for signature and entered forthwith without any further direction.

B. In all other cases contemplated by Rule 58(2) and when the court

makes any judgment as defined in Rule 54(a), F.R.C.P., the prevailing party shall, within five days after determination, prepare and submit through the clerk a written judgment or order with a written approval as to form or lack of objection endorsed thereon by the attorneys for every party affected thereby who is not in default for failure to appear.

C. If such endorsement of approval as to form or lack of objection has not been obtained within the said period the prevailing party shall move for the settlement of such judgment or order, upon not less than five days notice to every party affected thereby who is not in default for failure to appear, on the next available motion day.

D. Upon the filing of every appealable order, final judgment, or order affecting title to or creating a lien upon real or personal property, a correct copy shall be delivered to the clerk.

RULE 23 COSTS

A. Within thirty days after the entry of a judgment allowing costs, the prevailing party shall serve on the attorney for the adverse party and file with the Clerk, his Bill of Costs and Disbursements, together with a notice of motion when application will be made to the Clerk to tax the same.

B. Such Bill of Costs shall distinctly set forth each item thereof so that the nature of the charge can be readily understood, and shall be verified by the attorney for the applicant, stating that the items are correct and that the services were actually and necessarily performed and the disbursements were necessarily incurred in the action or proceeding.

C. The notice of motion shall specify the hour and date when application to the Clerk to tax the costs will be made, which shall not be less than one (1) nor more than three (3) days from the date of the notice if personal service is made, and if service is made by mail, not less than four (4) nor more than six (6) days from the date the notice is deposited in the mail.

D. Upon failure to comply with this rule, all costs shall be waived.

E. At, or prior to, the hearing the adverse party may file specific objections, supported by affidavits or other evidence, to claimed items of cost with a statement of the grounds of objection.

F. A dissatisfied party may appeal to the court upon written notice of motion served within five days of the Clerk's action, as provided in Rule 54(d) of the Federal Rules of Civil Procedure.

G. Unless otherwise ordered by the Court, the Clerk shall observe the following general rules in taxing costs:

(1) The fees of witnesses for actual and proper attendance shall be allowed, whether such attendance was voluntary or procured by subpoena.

(2) Witness fees shall not be allowed to parties to an action, but officers and employees of a party shall not be considered to be parties in interest solely because of such relationship.

(3) Where costs are taxed in favor of multiple parties there shall be no appointment of costs by the Clerk.

(4) In actions in which a counsel fee is allowed by the court, such fee shall be in lieu of the statutory attorney's docket fee.

(5) A reporter's transcript shall be considered to be necessarily obtained for use in the case if obtained for the use or by the direction of the court, master, or examiner, or if required for the record on appeal. All other transcripts of hearings, pretrials and trials will be considered by the Clerk as for the convenience of counsel and not taxable as costs.

(6) In taxing costs, the Clerk shall allow all or part of the fees and charges incurred in the taking and transcribing of depositions used at the trial under Rule 32, Federal Rules of Civil Procedure. Fees and charges for the taking and transcribing of any other deposition shall not be taxed as costs, unless the court otherwise orders.

(7) The reasonable premiums or expenses paid on undertakings or bonds or security stipulations shall be allowed where the same have been furnished by reason of express requirement of the law or a rule of court, or an order of the court or a judge thereof, or where the same is necessarily required to enable a party to receive some right accorded him in the action or proceeding. Amended April 12, 1976.

RULE 28 ORAL OPINIONS

When an oral opinion is given in lieu of a written opinion, the reporter shall transcribe and submit it to the judge for revision before it is filed.

## RULE 30 DISMISSAL OF INACTIVE CASES

A. Civil cases, other than bankruptcy matters, which have been pending in this court for more than 120 days without any proceedings having been taken therein, may be dismissed as a course for want of prosecution by the court on its motion, or notice by the clerk to all parties who have appeared.

B. Upon notice to the court or clerk that an action has been settled, within 15 days thereafter counsel shall file the necessary pleading to terminate the action. Upon failure of counsel to do so, the clerk shall prepare an order for submission to the court dismissing the action, without costs, and without prejudice to the right to reopen the action within 60 days upon good cause shown if the settlement is not consummated. .

RULE 40 UNITED STATES MAGISTRATES

A. Duties

Each United States Magistrate appointed by this Court is authorized to perform the following duties:

(1) Serve as a special master in an appropriate civil action, pursuant to 28 U.S.C. 636(b)(2) and Rule 53 of the Federal Rules of Civil Procedure;

(2) Where the parties consent, serve as a special master in any civil action without regard to the provisions of Rule 53(b) of the Federal Rules of Civil Procedure and try the issues of any civil action. The entry of final judgment in the civil action, however, shall be made by a judge of the court or at the direction of a judge with the consent of the parties;

(3) Exercise all the powers and duties conferred or imposed upon United States Commissioners by law or the Federal Rules of Criminal Procedure;

(4) Administer oaths and affirmations, impose conditions of release under 18 U.S.C. §3146, and take acknowledgments, affidavits, and depositions;

(5) Try persons accused of misdemeanors committed within this district in accordance with 18 U.S.C. §3401, order a presentence investigation report on any such person who is convicted or pleads guilty or nolo contendere, and sentence such persons;

(6) Conduct proceedings in accordance with Rule 40, Federal Rule of Criminal Procedure;

(7) Take a plea and impose sentence upon the transfer under Rule 20 of the Federal Rules of Criminal Procedure of any information or indictment charging a misdemeanor, if the defendant consents in writing to this procedure;

(8) Conduct extradition proceedings, in accordance with 18 U.S.C. §3184.

(9) Supervise proceedings conducted pursuant to letters rogatory, in accordance with 28 U.S.C. §1782.

(10) Hear and determine any pretrial motion or other pretrial matter, other than those motions specified in (11), infra, in accordance with 28 U.S.C. §636(b)(1)(A);

(a) Any party may appeal from a magistrate's determination made under this Rule within 10 days after issuance of the magistrate's order, unless a different time is prescribed by the magistrate or a judge. Such party shall file with the Clerk of the Court, and serve on all parties, a written notice of appeal which shall specifically designate the order or part thereof appealed from and the basis for objection thereto. The notice of appeal shall be submitted for filing in the form of a notice of motion in conformance with the requirements of General Rule 12 of the Rules of this Court. The party filing an appeal shall provide the court a transcript of that portion of the hearing before the magistrate wherein findings of fact were made, no later than ten (10) days before the return date of the motion. A judge of the court shall consider the appeal and set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law. The judge may also reconsider any matter sua sponte.

(11) Hear and conduct such evidentiary hearings as are necessary or appropriate and submit to a judge proposed findings of fact and recommendations for the disposition of:

(i) applications for post-trial relief made by individuals convicted of criminal offenses;

(ii) prisoner petitions challenging conditions of confinement; and

(iii) motions for injunctive relief (including temporary restraining orders and preliminary injunctions), for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by a defendant, to suppress evidence in a criminal case, to dismiss or permit the maintenance of a class action, to dismiss for failure to state a claim upon which relief may be granted, to involuntarily dismiss an action, for judicial review of administrative determinations, and for review of default judgments.

in accordance with 28 U.S.C. §636(1)(B) and (C).

(a) Any party may object to the magistrate's proposed findings, recommendations or report issued under this rule within ten (10) days after being served with a copy thereof. Such party shall file with the Clerk of Court, and serve on all parties, written objects which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objection. [Such party shall file with the Clerk a transcript of the specific portions of any evidentiary proceedings to which objection is made.] A judge shall make a de novo determination of those portions to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate. The judge, however, need not normally conduct a new hearing and may consider the record developed before the magistrate, making his own determination on the basis of that record. The Judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate with instructions.

(12) Exercise the powers enumerated in rules 5,8, 9 and 10 of the Rules Governing Section 2254 and Section 2255 Proceedings, in accordance with the standards and criteria established in 28 U.S.C. §636(b)(1).

(13) Where the parties consent, conduct a jury or nonjury trial in any civil action and order the entry of final judgment in accordance with 28 U.S.C. §636(c). In the course of conducting proceedings in any civil action upon consent of the parties, a magistrate may hear and determine any and all pretrial and posttrial motions which are filed by the parties, including case-dispositive motions.

(a) The Clerk of Court shall notify the parties in all civil cases that they may consent to have a magistrate conduct any or all proceedings in the case and order the entry of a final judgment. Such notice shall be mailed to the parties with the notice of the first pretrial conference.

(b) The Clerk shall not accept a consent form unless it has been signed by all the parties in a case. The plaintiff shall be responsible for securing the execution of a consent form by the parties and for filing such form with the Clerk of Court. No consent form will be made available, nor will its contents be made known to any judge or magistrate, unless all parties have consented to the reference to a magistrate. No magistrate, judge, or other court official, may attempt to persuade or induce any party to consent to the reference of any matter to a magistrate. This rule, however, shall not preclude a judge or magistrate from informing the parties that they may have the option of referring a case to a magistrate.

(c) The consent form shall be filed with the Clerk of Court within (15) days after the date of the final pretrial conference.

(d) After the consent form has been executed and filed, the Clerk shall advise the judge to whom the case has been assigned of the filing of the consent form. At the direction of the Judge, the Clerk shall prepare for the signature of the Judge an order of reference of the case to a magistrate. Once the case has been referred to a magistrate, the magistrate shall have the authority to conduct any and all proceedings to which the parties have consented and to direct the Clerk of Court to enter a final judgment in the same manner as if a judge had presided.

(14) Exercise general supervision of the civil and criminal calendars of the court, conduct calendar and status calls, and determine motions to expedite or postpone the trial of cases for the judges. As part of the magistrate's general supervision of the civil calendar, the magistrate shall conduct scheduling conferences in accordance with Rule 16 of the Federal Rules of Civil Procedure (as amended August 1, 1983), at which scheduling orders will be entered, in all civil cases except the following:

(a) all actions in which one of the parties appears pro se and is incarcerated;

(b) all actions for judicial review of administrative decisions of government agencies or instrumentalities where the review is conducted on the basis of the administrative record;

(c) prize proceedings, actions for forfeitures and seizures, for condemnation, or for foreclosure of mortgages or sales to satisfy liens of the United States;

(d) proceedings in bankruptcy, for admission to citizenship or to cancel or revoke citizenship;

(e) proceedings for habeas corpus or in the nature thereof, whether addressed to federal or state custody;

(f) proceedings to compel arbitration or to confirm or set aside arbitration awards;

(g) proceedings to compel the giving of testimony or production of documents under a subpoena or summons issued by an officer, agency or instrumentality of the United States not provided with authority to compel compliance;

(h) proceedings to compel the giving of testimony or production of documents in this District in connection with discovery, or testimony de bene esse, or for perpetuation of testimony, for use in a matter pending or contemplated in a U.S. District Court of another District.

(i) proceedings for the temporary enforcement of orders of the National Labor Relations Board.

(j) proceedings instituted for prosecution in a summary manner in the Superior Court of New Jersey and removed to this court on diversity only.

(15) Conduct pretrial conferences, settlement conferences, omnibus hearings, and related pretrial proceedings.

(16) Conduct arraignments in accordance with Rule 10 of the Federal Rules of Criminal Procedure to the extent of taking a not guilty plea or noting a defendant's intention to plead guilty or nolo contendere and ordering a presentence report in appropriate

cases.

(17) Receive grand jury returns and issue bench warrants, when necessary, for defendants named in an indictment.

(18) Conduct voir dire and select petit juries for the court.

(19) Accept petit jury verdicts in civil cases in the absence of a judge;

(20) Conduct necessary proceedings leading to the potential revocation of probation;

(21) Issue subpoenas, writs of habeas corpus ad testifcandum or habeas corpus ad prosequendum, or other orders necessary to obtain the presence of parties or witnesses or evidence needed for the court proceedings;

(22) Order the exoneration or forfeiture of bonds;

(23) Conduct proceedings for the collection of civil penalties of not more than $200 assessed under the Federal Boat Safety Act of 1971, in accordance with 46 U.S.C. §1484(d);

(24) Conduct examinations of judgment debtors, in accordance with Rule 69 of the Federal Rules of Civil Procedure;

(25) Review petitions in civil commitment proceedings under Title III of the Narcotic Addict Rehabilitation Act;

(26) Issue warrants or enter orders permitting entry into and inspection of premises, and/or seizure of property, in non-criminal proceedings, as authorized by law, when properly requested by the Internal Revenue Service or by other Governmental agencies; upon the request of the United States Attorney, authorize the installation of pen register devices and execute orders directing telephone company assistance to the government for such installation;

(27) Perform any additional duty as is not inconsistent with the Constitution and laws of the United States.

B. Assignment of Misdemeanor Cases.

Upon the filing of an information or the return of an indictment, all misdemeanor cases shall be assigned by the Clerk of Court to a Magistrate, who shall proceed in accordance with the provisions of 18 U.S.C. §3401 and the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates.

C. Record of Proceedings.

(1) The United States Magistrate disposing of a case involving a petty offense, as defined in 18 U.S.C. 1, or a misdemeanor, as defined in 18 U.S.C. 3401, shall file with the Clerk a record of proceedings prepared on forms, dockets, etc., to be furnished by the Administrative Office of the United States Courts. The record of proceedings, with the original papers attached, shall be filed with the Clerk not later than 20 days following the date of final disposition.

(2) All fines collected or collateral forfeited shall be transmitted immediately to the Clerk.

(3) In all other cases, as soon as the defendant is discharged or, after binding over, is either confined on final commitment or released on bail, except as provided in the court's plan implementing the Criminal Justice Act, the Magistrate is required within 20 days thereafter to transmit to the Clerk of Court his file on the case, including if issued or received by him, the original complaint, warrant of arrest with the officer's return thereon, temporary and final commitments with returns thereon and his completed transcript which consists of verbatim copies, carbon or otherwise, of all his successive docket entries in the case.

D. Warrants of Arrest.

The approval of the United States Attorney or one of his designated assistants shall be secured by United States Magistrates prior to the issuance of warrants on complaints of local police or private individuals.

E. Appeals from Judgments.

(1) Appeals from Judgments in Misdemeanors Cases.

A defendant may appeal a judgment of conviction by a magistrate in a misdemeanor case by filing a notice of appeal with the Clerk of Court within ten (10) days after entry of the judgment, and by serving a copy of the notice upon the United States Attorney. The scope of appeal shall be the same as on an appeal from a judgment of the district court to the court of appeals.

(2) Appeal from Judgments on Civil Cases disposed of by a Magistrate on consent of the parties.

(i) Appeal to the Court of Appeals.

Upon the entry of judgment in a civil case disposed of by a magistrate on consent of the parties under authority of 28 U.S.C. §636(c) and subsection A (13) of these rules, **supra** an aggrieved party shall appeal directly to the United States Court of Appeals for this circuit in the same manner as an appeal from any other judgment of this court.

(ii) Appeal to a District Judge.

(a) In accordance with 28 U.S.C. §633(c)(4), the parties may consent to appeal any judgment in a civil case disposed of by a magistrate to a judge of this court, rather than directly to the court of appeals. In such case, the appeal shall be taken by filing a notice of appeal with the Clerk of Court within thirty (30) days after entry of the magistrate's judgment; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within sixty (60) days of entry of the judgment. For good cause shown, the magistrate or a judge may extend the time for filing the notice of appeal for an additional twenty (20) days. Any request for such extension, however, must be made before the original time period for such appeal has expired. In the event a motion for new trial is timely filed, the time for appeal from the judgment of the magistrate shall be extended to 30 days from the date of the ruling on the action for a new trial, unless a different period is provided by the Federal Rules of Civil or Appellate Procedure.

(b)The Clerk of Court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record for all parties other than the appellant, or if a party is not represented by counsel to the party at his last known address.

(c)The record on appeal to a judge shall consist of the original papers and exhibits filed with the court and the transcript of the proceedings before the magistrate, if any. Every effort shall be made by the

parties, counsel, and the court, to minimize the production and costs of transcriptions of the record, and otherwise to render the appeal expeditious and inexpensive, as mandated by 28 U.S.C. §636(c)(4).

(3) Memoranda on Appeal to District Judge

The appellant shall, within 20 days of the filing of the notice of appeal, service and submit a typewritten memorandum. The appellee shall serve and submit a memorandum within 20 days of the receipt of a copy of appellant's memorandum. The appellant may serve and submit a reply memorandum within five (5) days after receipt of the appellee's memorandum. Fifty (50) days after the filing of the notice of appeal, the appeal shall be placed, by the Clerk, upon the calendar to be set for hearing.

F. Forfeiture of Collateral in lieu of Appearance.

(1) In a case involving a petty offense as defined in 18 U.S.C. 1, or in suitable types of misdemeanors, except as modified below, a forfeiture of collateral security may be accepted in lieu of appearance as a proper disposition of the case.

(2) There shall be maintained at each office of the Clerk and United States Magistrates a list of the offenses and fines applicable thereto for which a forfeiture of collateral security may be accepted.

(3) Persons charged with offenses which do not appear on the list must appear for trial. Amended June 30, 1978; June 16, 1980.

## APPENDIX S

## CONSTITUTIONAL PROVISIONS

### CONSTITUTION OF THE UNITED STATES

Amendment V

(1 U.S. Stat. 21;

U. S. C. A. Const. Amend. V, p. 4)

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

(1 U.S. Stat. 21;

U. S. C. A. Const. Amend. XIV, p. 6)

Section one (1) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

## APPENDIX T

## UNITED STATES STATUTES

### 28 USC 1332

### Diversity in Citizenship;

### Amount in Controversy; Costs

(a) The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000., exclusive of interests and costs, and is between

(1) Citizens of a different State
(2) Citizens of a State, and Foreign States or citizens or subjects thereof; and
(3) Citizens of different States and in which Foreign States or citizens or subjects thereof are additional parties.

### 28 USC 1343

The District Courts shall have original jurisdiction of any civil action authorized to be commenced by any person:

(1) to recover damages for injury to his person, property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42;

(2) to recover damages from any person who fails to prevent or aid in preventing any wrongs mentioned in Section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) to redress the deprivation, under the color of any State law, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) to recover damages or to secure equitable relief under any act of Congress providing for the protection of civil rights, including the right to vote.

## 42 USC 1983

### Civil Action for Deprivation of Rights

Every person, who, under color of any Statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

## 42 USC 1985

(2)If two or more persons in any State or Territory conspire to deter by force . . . . or having been such juror; or if two persons conspire for the purposes of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws,

(3). . . .the party so injured or deprived may have an action for recovery of the damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

## 42 USC 1986

### Same, Action for Neglect to Prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 of this Title are about to be committed, and having the power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all the damages caused by such wrongful act, which person by reasonable diligence could have prevented; and such damage may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action . . . .

JUDICIARY-PROCEDURE

§636 Jurisdiction, powers and temporary assignment

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgements, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall be mailed to all parties.

(1) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(2) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district

judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conferences shall endeavor to make such appeal expeditious and inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(7) The magistrate shall determine, taking into account the complexity of the particular matter referred to the magistrate, whether the record in the proceeding shall be taken, pursuant to section 753 of this title, by electronic sound recording means, by a court reporter appointed or employed by the court to take a verbatim record by shorthand or by mechanical means, or by an employee of the court designated by the court to take such a verbatim record. Notwith-

standing the magistrate's determination, (A) the proceeding shall be taken down by a court reporter if any party so requests, (B) the proceeding shall be recorded by a means other than a court reporter if all parties so agree, and (C) no record of the proceeding shall be made if all parties so agree. Reporters referred to in this paragraph may be transferred for temporary service in any district court of the judicial circuit for reporting proceedings under this subsection, or for other reporting duties in such court.

(d) The practice and procedure for the trial of cases before officers serving under this chapter, and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 3402 of title 18, United States Code.

(e) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpoenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt comitted before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

(f) In an emergency and upon the concurrence of the chief judges

of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a) or (b) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code. A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(As amended Oct. 17, 1968, Pub.L. 90-578, Title I, § 101, 82 Stat. 1113; Mar. 1, 1972, Pub.L. 92-329, §§ 1, 2, 86 Stat. 47; Oct. 21, 1976, Pub.L. 94-577, § 1, 90 Stat. 2729; Oct. 28, 1977, Pub.L. 95-144, § 2, 91 Stat. 1220; Oct. 10, 1979, Pub.L. 96-82, § 2, 93 Stat. 643.)

**References in Text.** The Rules of Criminal Procedure for the United States District Courts, referred to in subsec. (a)(1), are classified to Title 18, Crimes and Criminal Procedure.

The Federal Rules of Civil Procedure for the United States district courts, referred to in subsec. (b)(2) are classified to this title.

## APPENDIX U

## FEDERAL COURT RULES

**Rule 4. Appeal as of Right—When Taken**

(a) APPEALS IN CIVIL CASES. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

**Rule 5. Service and Filing of Pleadings and Other Papers.**

(a) SERVICE: WHEN REQUIRED. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(b) SAME: HOW MADE. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

**Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.**

(a) WHEN PRESENTED. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer

to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claims is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

## VI. TRIALS

### Rule 38. Jury Trial of Right.

(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) DEMAND. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(c) SAME: SPECIFICATION OF ISSUES. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) WAIVER. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(e) ADMIRALTY AND MARITIME CLAIMS. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

**Rule 41. Dismissal of Actions.**

(a) VOLUNTARY DISMISSAL: EFFECT THEREOF.

(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(c) DISMISSAL OF COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

## VII. JUDGMENT

**Rule 54. Judgments; Costs**

(a) DEFINITION; FORM. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(e) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

## SUMMARY JUDGMENT

**RULE 56. Summary Judgment.**

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b)FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**Rule 58. Entry of Judgment.**

Subject to the provisions of Rule 54(b)(1): upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

**Rule 59. New Trials; Amendment of Judgments.**

(a) GROUNDS. A new trial may be granted to all or any of the

parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

## RELIEF FROM JUDGMENT OR ORDER

**Rule 60. Relief From Judgment or Order.**

(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3)fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

## X. DISTRICT COURTS AND CLERKS

**Rule 77.District Courts and Clerks.**

(a) DISTRICT COURTS ALWAYS OPEN. The district courts shall be deemed always open for the purpose for filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(b) TRIALS AND HEARINGS; ORDERS IN CHAMBERS. All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district; but no hearing, other than one *ex parte*, shall be conducted outside the district without the consent of all parties affected thereby.

(c) CLERK'S OFICE AND ORDERS BY CLERK. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a district court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, and Christmas Day. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(d) NOTICE OF ORDERS OR JUDGMENTS. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a)

of the Federal Rules of Appellate Procedure.

**History of Rule and Comment**

*General History*

Subdivisions (a) and (b) remain unchanged.

Subdivision (c) was amended in 1963; subdivision (d) was amended in 1946, 1963, and again in 1968.

**Subdivision (c)**

*1963 Amendment*

The 1963 amendment to Rule 77(c) provides for the closing of the clerk's office, unless required by the district court to stay open for specified hours, on Saturdays and legal holidays, other than those legal holidays enumerated in the amended rule. The change is shown in the following reprint (matter added is in italics):

(c) CLERK'S OFFICE AND ORDERS BY CLERK. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except *Saturdays,* Sundays, and legal holidays[.], *but a district court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, and Christmas Day.* All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

## APPENDIX V

## ORDER AS TO EXECUTION OF DEED OF CONVEYANCE FILED MAY 28, 1979

Probate Court

CHARLES, STURM & MASTER
ATTORNEYS AND COUNSELORS AT LAW
A PROFESSIONAL CORPORATION
610 HADDON AVENUE
COLLINGSWOOD, NEW JERSEY 08108
AREA CODE 609 858-4930

*ATTORNEYS FOR* FIRST PEOPLES BANK OF NEW JERSEY

SUPERIOR COURT OF
NEW JERSEY
LAW DIVISION
PROBATE PART
CAPE MAY COUNTY
*Docket No.*

IN THE MATTER OF THE ESTATE
OF MARY V. SULLIVAN, Deceased

*CIVIL ACTION*

ORDER AS TO
EXECUTION OF DEED
OF CONVEYANCE

This matter having come before the Court upon the application of John J. Master, Jr., Esquire, of the firm of Charles, Sturm & Master for direction and an Order of the Court as to the requirements of execution of a Deed to Convey premises commonly known and designated as 50 Central Avenue, Ocean City, New Jersey which was the subject of this Court's prior orders of August 29, 1978 and April 23, 1979; and

It being represented to the Court that a Deed to convey the premises has been drafted in accordance with the requirements of Chelsea Ti-

tle and Guarantee Company and that the Deed has been executed by the corporate trustee and by the individual co-trustees, Harry F. Sundstrom and Donald R. Sundstrom; and

It being further represented to the Court that ample and diligent efforts have been undertaken to secure the execution of the aforementioned Deed by Thomas E. Sundstrom, a co-trustee, specifically including telephone messages, personal visits to the residence where Thomas E. Sundstrom lives, and direct contact between Harry F. Sundstrom and Thomas E. Sundstrom relating to the subject of execution of the Deed; and

It being represented to the Court that the aforementioned Thomas E. Sundstrom has refused or otherwise made himself unavailable to execute the Deed of Conveyance; and

It appearing to the Court that the aforementioned Thomas E. Sundstrom was present in Court and stated his agreement as part of the Court record to the conveyance of this property on July 27, 1978 and that the aforementioned Thomas E. Sundstrom was present and in Court when the Court again directed the sale of this property and the execution of a Deed of Conveyance at a hearing before the Court on April 5, 1979; and

It further appearing to the Court that James Sundstrom Sullivan is required to appear at the time of settlement to accept this conveyance and tender the purchase price and has represented that he could execute the Deed at the time and place of settlement; and

It appearing to the Court that the aforementioned James Sundstrom Sullivan notified the parties of settlement scheduled for 3:00 P.M., May 16, 1979, and failed to appear at the time and place that he scheduled for settlement; and

For other good cause being shown;

NOW, THEREFORE, it is on this 21st day of May, 1979, ORDERED AND ADJUDGED that the Deed of Conveyance of premises commonly known and designated as 50 Central Avenue, Ocean City, New Jersey as executed by the corporate trustee, First Peoples Bank of New Jersey, by the individual co-trustee, Harry F. Sundstrom and by the individual trustee Donald R. Sundstrom is valid and sufficient to convey to any grantee all right, title and interest of the grantors, including the fee simple absolute, and specifically

conveys the right, title and interest of Thomas E. Sundstrom and James Sundstrom Sullivan (formerly James D. Sundstrom) and all heirs, assigns or other parties claiming right, title and interest by or through Thomas E. Sundstrom or James Sundstrom Sullivan (formerly James D. Sundstrom).

s/N.C.S.

NATHAN C. STALLER J.S.C.

## APPENDIX W

## PLAINTIFFS' ORIGINAL COMPLAINT FILED MAY 29, 1980

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

JAMES SUNDSTROM SULLIVAN, and
HELEN DAWSON SULLIVAN,
Plaintiffs

vs. Civil Action No. 80-1554

THE 1st PEOPLES BANK OF NEW JERSEY,
THE MARY V. SULLIVAN TRUST FUND,
THOMAS E. SUNDSTROM, Trustee
DONALD R. SUNDSTROM, Trustee
HARRY F. SUNDSTROM, Trustee
JOHN J. MASTER, JR., Esq.,
(A New Jersey Attorney at Law),
JOHN J. MARKWARDT, Esq.,
(A New Jersey Attorney at Law),
JANET STUART, AND SURTEES MacKERCHAR,
(Trust Officers of the 1st Peoples
Bank of New Jersey),
Defendants

## PLAINTIFFS' ORIGINAL COMPLAINT

NOW COME James Sundstrom Sullivan and Helen Dawson Sullivan husband and wife, residing and being citizens of the State of Maryland, with domicile at Route 301, Box 205, Newburg, Maryland 20664, and complains of The Mary V. Sullivan Trust Fund with residence at the 1st Peoples Bank of N.J., Cuthbert Road at MacArthur, Westmont, New Jersey 08108; The 1st Peoples Bank of New Jersey (A New Jersey Corporate Trustee); Harry F. Sundstrom (Trustee of the Mary V. Sullivan Trust Company who is a citizen of the State of New Jersey residing at 1008 Lafayette Street, Cape May, New Jersey 08204); Thomas E. Sundstrom (Trustee of the Mary V. Sullivan Trust Fund who is a citizen of the State of Pennsylvania, whose last and usual place of abode was

demolished by fire, and whose legal representative *is the Mary* V. Sullivan Trust Fund); Donald R. Sundstrom (Trustee of the Mary V. Sullivan Trust Fund, whose residence and domicile is 16 Kerr Place, Lansdowne, Pennsylvania 01950, and who is a citizen of the State of Pennsylvania); John J. Master, Jr., Esq. (A New Jersey Attorney at Law, representing the 1st Peoples Bank of New Jersey, with offices at 610 Haddon Avenue, Collingswood, New Jersey 08108) John J. Markwardt, Esq., (A New Jersey Attorney at Law, representing Donald R. Sundstrom, Trustee, with offices at 32 N. Black Horse Pike, Blackwood, N.J. 08065); Janet Stuart, and Surtees MacKerchar, both Trust Officers of the 1st Peoples Bank of New Jersey, located on South Broad Street, Woodbury, New Jersey such complaint setting forth causes of action for breach of contract intentional interference with an order of the Superior Court of New Jersey; intentional interference with a contract relationship; injunctive relief to prevent the sale of trust property known as 50 Central Avenue, Ocean City, N.J. to persons other than James Sundstrom Sullivan, and Helen Dawson Sullivan; and for a specific performance to sell the said premises of 50 Central Avenue, Ocean City, N.J. to the Plaintiffs, James and Helen Sullivan.

## JURISDICTIONAL PARAGRAPH

These actions arise as actions of contract and tort, and jurisdiction is conferred in *Title 28 of the United States Code, Section 1332*, as the Plaintiffs are citizens of the State of Maryland, and the Defendants are citizens of the States of New Jersey and/or Pennsylvania, and in the case of Defendant Thomas E. Sundstrom, Trustee, a citizen of a State other than the State of Maryland. The amount in controversy exceeds the sum of ten thousand dollars ($10,000.) exclusive of interest and costs.

## COUNT ONE

Plaintiffs direct this count for an action for injunctive relief to prevent the sale of the premises of 50 Central Avenue, trust property of the Mary V. Sullivan Trust Fund to other parties or persons than Plaintiffs, and assert a cause of action for a specific performance for the amount set forth in the Court Order of the Probate Court of

Cape May County, New Jersey, on August 29.

1. Plaintiff James Sundstrom Sullivan is the natural son of Mary V. Sullivan who died August 11, 1967 testate, and left a last will and testament naming the Defendants Harry F. Sundstrom, Thomas E. Sundstrom, and Donald R. Sundstrom beneficiaries, and also co-trustees of the estate, along with Plaintiff Sundstrom-Sullivan and also named the Provident Bank of Philadelphia, Pa., as executor and corporate trustee of the newly created Mary V. Sullivan Trust Fund. Said last will and testament was admitted to probate in Cape May County, New Jersey, and the assets were transferred to the trustees in accordance with the terms.
2. The Provident Bank of Philadelphia, Pa., was removed as corporate trustee as a result of differences which arose due to mismanagement of another different and distinct trust fund, and the Vineland National Bank and Trust Fund was substituted as corporate trustee of the Mary V. Sullivan Trust Fund, and said trust officers of the Vineland National Bank and Trust Fund began converting securities without permission of the other co-trustees of the estate, and gaining personal profits, and not revealing said profits for proper distribution to the beneficiaries and also merged with the 1st Peoples Bank of New Jersey of Westmont, New Jersey without notice to any of the other co-trustees, and beneficiaries, and continued tortious and criminal activities without the knowledge of the co-trustee/beneficiaries.
3. The property of 50 Central Avenue, Ocean City, N.J. was agreed to have been transferred over to the individual trust of James Sundstrom Sullivan as soon as the executor completed the probate of the last will and testament of Mary V. Sullivan, and such price of sixteen thousand nine hundred dollars ($16,900.) was agreed by all trustees and beneficiaries in or around 1969.
4. In January of 1969, the Plaintiff Sullivan moved into the property with his wife and family of 8 children and remained there until the wife of co-trustee/beneficiary Sullivan had him arrested on June 23, 1974 for criminal trespass on the property of which he was to have benefited, and as a result, chased a salesforce of Plaintiff's business and caused a loss of in excess of one hundred thousand dollars ($100,000.)
5. Defendant 1st Peoples Bank of New Jersey, its agents and

representatives, and the other co-trustees of the estate did nothing when requested to appear for trial to protect the interests of the co-trustee-beneficiary Sullivan, and Defendant 1st Peoples Bank of New Jersey neglected and refused to appear under subpoena to testify at the criminal trial of Plaintiff in Tuckahoe, N.J. in October of 1975.

6. The property decayed into severe disrepair as a result of neglect of the Defendant 1st Peoples Bank of New Jersey, and although the market value of the property was appreciating due to increased economic activity of Atlantic City, N.J., the property fell into a bad state of disrepair.

7. At no time was it ever represented that the property was not the asset of the individual trust of James Sundstrom Sullivan, beneficiary.

8. On or about March of 1978, the corporate trustee, 1st Peoples Bank of New Jersey was ordered by the Probate Court to file a first intermediate accounting before the Honorable Nathan C. Staller, Superior Court, Probate Division, State of New Jersey, by virtue of an order procured by the Defendant John J. Markwardt, Esq., representing the Defendant Donald R. Sundstrom, a co-trustee of the Mary V. Sullivan Trust Fund.

9. The accounting was met with great resistance by the other trustees and Plaintiff Sundstrom Sullivan filed exceptions, along with a counterclaim in tort, breach of trust, and other equitable actions to which the trial judge, Staller, J. dismissed the tort and other actions without prejudice to refile them in the law division to accomodate a trial by jury as demanded in the pleadings, and to separate the accounting filed, and permit it to go to judgment.

10. A settlement was reached and understood in that the property of 50 Central Avenue, Ocean City, N.J. was to be sold to James Sundstrom Sullivan for the agreed price of twenty five thousand dollars ($25,000.), and that twelve thousand dollars ($12,000.) was to be paid for back interest due and claimed in the exceptions, with the full understanding of each beneficiary to receive three thousand dollars ($3,000.).

11. The order was drafted by the Defendant Master, representing the Defendant 1st Peoples Bank of N.J., and submitted for inspection under the five day rule of notice as to form and

content, and not executed by the Court, Staller, J., until the expiration in excess of thirty days of the date of the hearing, consuming the greater part of the time necessitated for the obtaining of a mortgage on the property. Said mortgage company refused to process the mortgage application unless it was accompanied by an agreement of sale between the parties, or in this case, the signed court order.

12. The Defendant Master had been attempting to vitiate the sale of the premises to Plaintiff, and was attempting to gain equity in the account of Plaintiff in the trust fund to offset an unlawful co-mingling of funds of the trust to pay off a private loan of Plaintiff on secured land as collateral, by an entry into the trust fund in direct violation of State Law regarding the same.

13. Said court order required that Plaintiffs obtain a firm commitment in sixty days, and placed stringent and unconscionable terms on the procurement of a mortgage commitment in violation of the constitutional rights of the Plaintiff, and Defendant Master had drafted the document and the Court, Staller, J., signed the order after consuming the greater part of the application period on his personal vacation, and more time consumed in the return of the signed original, and reproduction of the same with subsequent service on Plaintiff. Plaintiff had less than two weeks to procure a firm commitment in writing, and as a result filed a motion for an extension of time to procure the same.

14. Defendant 1st Peoples Bank of New Jersey, represented by the Defendant Master firmly resisted the motion for no apparent reason except to intentionally interfere with the Plaintiff Sullivan's right to purchase the premises of 50 Central Avenue, Ocean City, N.J.

15. Defendant Master appeared in the Probate Court with strong and stringent resistance to the motion for an extension by attempting to impose contingencies that a firm commitment in writing must be in the office of the corporate trustee in five days, subject only to an appraisal, which contingency is unacceptable and uncommon practice by lending institutions in mortgage applications in the past, present, and future day.

16. Said Defendant Master, in his capacity as counsel for Defendant 1st Peoples Bank of New Jersey, attempted to submit an order, on Plaintiff's motion, which set forth those impossible

terms in said order, which was objected to by Plaintiff.

17. Defendant Master, acting for Defendant 1st Peoples Bank of New Jersey, then ordered the Defendants Surtees MacKerchar, and the junior trust officer, Defendant Janet Stuart, to refuse to give the keys of the premises of 50 Central Avenue, Ocean City, N.J. to the appraiser for the Collective Federal Savings and Loan Association, the Plaintiff's lending institution, for an appraisal before the firm commitment in writing on or about November 5, 1978.

18. The appraiser for said lending institution had to enter the home by use of a ladder and without keys, and the firm commitment in writing was issued soon thereafter, and a copy thereto in the office of the corporate trustee by November 22, 1978.

19. Plaintiffs thereafter ordered a title search from the American Suburban Title Company in Ocean City, N.J., and received a call in early December, 1978, that a title search revealed an early trust instrument naming Donald R. Sundstrom, one of the Defendants to have vested some interest in the premises by virtue of a trust instrument which expired by its own limitation, and Plaintiffs thereupon called the Chelsea Title and Guaranty Company of Ocean City, N.J., who researched the title past that dead trust fund, and declared the title marketable, and within the Mary V. Sullivan Trust Fund, and issued a firm commitment for title insurance to James Sundstrom Sullivan, and Helen Dawson Sullivan, husband and wife, for the purchase of the property.

20. Without any court order which vacated the original order, and the extension thereto, the Defendants Markwardt and Donald R. Sundstrom refused to go to settlement on December 22, 1978, at which time title was to have passed by virtue of the stringent time elements placed on Plaintiffs by the actions of Defendants.

21. On or about December 22, 1978, Defendant Master, 1st Peoples Bank of New Jersey, Defendants Markwardt and Donald R. Sundstrom intentionally and without legal sanction of the probate court in Cape May County, by either letter directive, or by notice of motion with valid cause, or opportunity to be heard by Plaintiffs, interfered with the court order and its directions of August 29, 1978, and breached the contract with Plaintiffs James and Helen Sullivan, causing emotional stress, great loss of time and money, plus travel and settlement expenses to be enumerated **infra.**

22. At no time did Plaintiffs ever repudiate the terms of the court order and complied with the terms therein, however unfair and unconscionably and Defendants Master, Markwardt, 1st Peoples Bank of New Jersey, and Donald R. Sundstrom pursued a line of unfairness in business, and deliberate and intentional interference with a court order which set forth terms of the settlement and sale of the premises of 50 Central Avenue, Ocean City, N.J.

23. Defendant Markwardt and Master, proporting to be officers of the court and members of the bar association of New Jersey, pursued a line of highly unethical tactics designed to discourage and deter the Plaintiffs from the terms of the contract, and boldly pursued a path which was tortious and unlawful to breach the terms of the contract set forth in the court order of August 29, 1978.

24. At no time did Defendant Harry F. Sundstrom ever repudiate the terms set forth by the probate court, nor do the Plaintiffs hold Defendant Harry F. Sundstrom liable for the actions of the other defendants, either actual, or in civil conspiracy, with common design and common purpose.

25. The two attorneys, Defendants Markwardt and Master, worked a civil conspiracy to breach the contract; that is, they had a common design and a common purpose, which caused Plaintiffs damage as a result.

26. Defendants conduct was tortious, and Plaintiffs were ready, willing, and able to settle on the settlement date, and Defendants repudiated the terms of the contract, while Defendants Donald R. Sundstrom and Markwardt pursued another title search, which was agreed upon by Defendants Master and 1st Peoples Bank of New Jersey.

27. Plaintiff Sullivan received a telephone call from Defendant Donald R. Sundstrom and Defendant Sundstrom bragged as to how the Defendant Markwardt had instructed him to sue title companies, and the profit they could make.

28. Defendant Markwardt received confirmation from the same Title Company, Chelsea Title and Guaranty Company, that the property was marketable and was in the Mary V. Sullivan Trust instrument, and such information was given to Defendant Markwardt in early January of 1979, after the first breach, and Plaintiff found this information from Chelsea, and confronted Defendant Markwardt, who then refused to go to settlement until he had instructions from the Court. Plaintiff again set down settlement in January of 1979, and had the lending institution forward on the settlement papers and monies for settlement, and Defendants Master and Markwardt again intentionally interfered with settlement, now concocting the excuse that court directions were necessitated, not setting forth with specificity what exactly was needed in the form of instructions.

29. Plaintiff had until only February 22, 1979 until their firm commitment for 9.5% interest on a 17,500. mortgage loan expired, and as a result filed a motion to compel settlement, which the Clerk of the Surrogate court could not set down due to the Honorable Nathan Staller, J.S.C. being beaten on the courtroom steps by a disgruntled litigant, and hospitalized as a result.

30. Plaintiffs then set down another settlement date of February 17, 1979 and had the necessary papers forwarded for a third time by the lending institution, to which both Markwardt and Master, representing the other Defendant, still repudiated the settlement time and date, and refused to pass title, breaching the terms of the contract for the third time.

31. At no time did Plaintiffs ever repudiate the terms of the contract and were ready, willing and able to settle at all three dates.

32. During the interim, Plaintiffs received no less than twenty (20)

offers to purchase the property for a price in excess of seventy five thousand dollars ($75,000.) due to appreciation of the property over land value in the shore area.

33. Plaintiff James Sundstrom Sullivan has eight remaindermen who are paying in excess of one thousand dollars ($1,000.) per month in Ocean City, N.J. and have been for a period of three and one half years, prior to the first intermediate accounting of the corporate trustee.

34. Plaintiffs planned to live and reside in the property, and to give housing to the eight Sullivan remaindermen, and Defendants have caused severe damage and an oblique change of plans by their intentional interference to settlement dates set down by Plaintiffs.

35. Upon recovery, the Probate Court set down the motion to compel settlement in April of 1980, only after the Plaintiffs had to agree to a higher rate of interest of 11.75% to procure a new mortgage commitment, and settlement was again set down in May of 1980.

36. During the interim, and due to the activities of the corporate trustee and the welching of terms of settlement of the first intermediate accounting, Plaintiff James Sundstrom Sullivan, as trustee-beneficiary of the Mary V. Sullivan Trust Fund brought an action in tort, breach of trust, ad fraudulent conveyance and concealment against the trust department of the 1st Peoples Bank of N.J. in an action known as *Sullivan vs. The First Peoples Bank of N.J.* (Docket No. L-20772-78) citing among other things, embezzlement and misuse of trust funds by certain trust officers of the 1st Peoples Bank of N.J. Said action resisted two motions for summary judgment by Defendants, and is slated for trial by jury and is directly connected to the premises of 50 Central Avenue, Ocean City, N.J., and its condition and status of ownership.

37. Defendant Thomas E. Sundstrom, another trustee-beneficiary of the Mary V. Sullivan Trust Fund, joined Plaintiff in the action due to actions by the 1st Peoples Bank of New Jersey, and the Defendants Master, MacKerchar, and Stuart. Said Defendants in the instant action treated Defendant Sundstrom (Thomas) with contempt and disregard after an accident on December 17, 1978, in which said Defendant Thomas E. Sundstrom necessitated financial and moral aid. (See affidavit of Helen Dawson Sullivan, attached).

38. Defendant Master, 1st Peoples Bank of N.J., MacKerchar, and Stuart denied aid in his financial need, and treated him with rudeness, and like a dog in the streets, and did so to prevent any finances from reaching him to aid Plaintiffs in the purchase of the premises of 50 Central Avenue.

39. As a direct result of the actions of Defendants Master, 1st Peoples Bank of New Jersey, MacKerchar, and Stuart, Defendant Thomas E. Sundstrom refused to transfer any title over to the premises of 50 Central Avenue, Ocean City, N.J. and breached the contract for the fourth time, and this breach of contract and intentional interference of another court order for the sale of the premises of 50 Central Avenue, Ocean City, New Jersey was the direct and proximate cause of the Defendant Master, who engineered the breach, and the Defendants 1st Peoples Bank of New Jersey, MacKerchar, and Stuart. Defendant Stuart has left the employment of the 1st Peoples Bank of N.J.

40. As a direct and proximate result of the breach of Thomas E. Sundstrom, incited and directly caused by the mishandling of a general trust situation, and the inhumane results and treatment of Defendant Thomas E. Sundstrom, the Collective Federal Savings and Loan Association cancelled the firm commitment of the Plaintiffs for the mortgage monies of seventeen thousand five hundred dollars ($17,500.), and Plaintiffs were without a first mortgage, and incurred settlement costs, travel expenses, and other expenses, as well as sustaining great emotional stress and damage.

41. Plaintiffs have been deprived of the property of 50 Central Avenue, Ocean City, N.J., and Defendants have successfully and intentionally interfered with Plaintiffs right and purpose to purchase the same, and have sold the property for thirty five thousand dollars ($35,000.) scheduled for settlement on May 30, 1980.

42. Plaintiffs James Sundstrom Sullivan, and Helen Dawson Sullivan have been deprived of their bargain for the purchase of the property through the concerted actions and conspiracy of Defendants Master, Markwardt, 1st Peoples Bank of New Jersey, and have lost in excess of fifty thousand dollars ($50,000.) as a result, in addition to settlement costs incurred, and the possible and probable loss of seven thousand dollars ($7,000.) loss of their

furniture.

43. As a direct result of the actions of the Defendants, Plaintiffs are without a home, and had changed job situations to conform with the purchase of the premises in the shore area, approximately several hundred miles from their job area, which was advantageous.

44. The Defendant Master, in concert with the Defendants 1st Peoples Bank of New Jersey has obtained another order from the Probate Court to sell the premises withut the signatures of the other co-trustees, in direct defiance and contrary to the terms of the last will and testament of the late Mary V. Sullivan.

45. The 1st Peoples Bank of New Jersey has been involved with embezzlement and unlawful conversions of trust monies over a period of eleven years and has reported no income to beneficiaries, has invaded the individual trust of James Sundstrom Sullivan, and has charged said trust with a personal loan of in excess of thirteen thousand dollars ($13,000.) which had no interest in the trust, but made liable to a different section of the 1st Peoples Bank of N.J. in direct violation of state statute regulating co-mingling of monies in the trust department.

46. The Honorable Herbert Horn stayed the sale of the premises, and the full court in the Appellate Division joined; but upon the retirement of Judge Horn in February of 1980, and the appointment of George B. Francis to the Appellate Division, the Appellate Division, part F, now containing Judge Francis, suddenly reversed the original stay, and denied the motion for a stay of the sale of 50 Central Avenue, Ocean City, N.J.

47. Plaintiff Sullivan asserts that a personal feeling between Judge Francis and himself is the cause of the reversal, over a matter involving "beach fees" in 1976, in which Francis, threatened the Plaintiff with the Disorderly Persons Act to intimidate him from bringing suit to invalidate "beach fees" as being unconstitutional on federal grounds.

48. On application to the State Supreme Court for a stay of the Probate Court's Order to stay the sale of the premises of 50 Central Avenue, Ocean City, N.J. through the corporate trustee, the Defendant 1st Peoples Bank of New Jersey, the State Supreme Court of New Jersey without comment, denied the stay,

and Plaintiffs have exhausted their State Court remedy for injunctive relief.

WHEREFORE, THE PLAINTIFFS DEMAND JUDGMENT AS FOLLOWS:

1. For an order to issue requiring the Defendants to show cause before the United States District Court for the District of New Jersey why a preliminary and temporary injunction should not issue staying the sale of 50 Central Avenue, Ocean City, New Jersey to any other buyer other than the Plaintiffs James Sundstrom Sullivan, and Helen Dawson Sullivan.

2. That upon determination of said hearing, that the Defendants 1st Peoples Bank of New Jersey, Thomas E. Sundstrom, and Harry F. Sundstrom and Donald R. Sundstrom transfer by specific performance, a warrant deed to the property of 50 Central Avenue, Ocean City, N.J. to the Plaintiffs, James Sundstrom Sullivan, and Helen Dawson Sullivan.

3. For any other general relief which is adequate and just.

4. For the costs of this suit.

5. For trial by jury on the issues of fact set forth in the complaint.

**COUNT TWO**

Plaintiffs direct this count against the Defendants Master, 1st Peoples Bank of New Jersey, MacKerchar, Stuart, Markwardt, and Donald R. Sundstrom, and Plaintiffs assert a cause of action for intentional interference of a court order and contract for the sale of 50 Central Avenue. Plaintiffs assert a cause of action against Defendant Thomas E. Sundstrom for intentional interference with mitigating circumstances which were caused proximately by the Defendants Master, 1st Peoples Bank of N.J., MacKerchar, and Stuart. Plaintiffs assert no cause of action against Defendant Harry F. Sundstrom, but join him as an indispensible party to the action.

1. Plaintiffs reallege, restate, and recount all of the allegations in Count One, supra, and Count Three, infra, and by reference make the part of this Count, by reference.
2. Defendants, Master, MacKerchar, Stuart, and 1st Peoples Bank have intentionally, and in conspiracy, interfered with Plaintiff's right to purchase his own permises from the Mary V. Sullivan Trust Fund, for the amount set forth in the Probate Order of August 29, 1978.
2. At all times Defendants named have attempted to vitiate the terms of the order, and have held conferences with the Probate Judge by excluding Plaintiff James Sundstrom Sullivan from said conferences in violation of court rule, and the judicial ethics of the Supreme Court of New Jersey.
3. The Probate Judge is the same judge who adjudged Plaintiff James Sundstrom Sullivan guilty of criminal trespass on his own trust property in June of 1974, which set loose a series of law suits to recover damages to a business known as *Sullivan vs. Watts, C.A. No. 74-1455* (Camden Co., N.J.). (USDC, N.J.)
4. Defendants are responsible for overt acts set forth in Count One, and repudiated the terms of the Court Order of the Probate Court of August 29, 1978, and have been attempting to void the sale of the premises to Plaintiffs since the order was entered.
5. Defendants refused to give the key to the appraiser for the lending institution's inspection of the proposed mortgage evaluation, and adopted a negative and passive attitude in facilitating the sale in accordance with the court order, in an attempt to expedite the time expiration of the same.
6. Defendants Markwardt and Donald R. Sundstrom deliberately and with malicious intention to defeat the order of August 29, 1978, refused to settle on December 22, 1978, and without the legal remedy to have said order set aside and to vacate said order, for good cause, ignored the terms, and repudiated the terms regarding the time requirements which were prejudicial to Plaintiffs, and caused great stress between Plaintiffs and the lending institution, and severely prejudiced the mortgaged application.
7. Defendant Harry F. Sundstrom did no damage to Plaintiffs, and was ready, willing and able to settle with Plaintiffs in accordance with the orders of the court.
8. Defendant Thomas E. Sundstrom was under great emotional

stress due to a fire, in which he broke his leg in both places, and was greatly mistreated by Defendants, Master, 1st Peoples Bank of N.J., MacKerchar, Stuart, and unknown officers of the Defendant 1st People Bank of New Jersey, and refused to settle or sign a deed to convey.

9. All monies from the proceeds of the sale of the premises was to go into the Mary V. Sullivan Trust Fund, which the Defendant 1st People Bank of New Jersey is the corporate trustee.

10. The First Peoples Bank of New Jersey, through other trust officers have been unlawfully converting, and embezzling monies committed to their trust, and have filed a false first intermediate accounting in the Probate Court of Cape May County, New Jersey, and Plaintiff Sullivan has an active action scheduled for trial by jury in the Superior Court of New Jersey, Camden County Superior Court, Law Division.

11. The Defendants have been attempting to use the premises of 50 Central Avenue, Ocean City, N.J., and a court order permitting them alone to sell the house, to bargain with Plaintiff to drop the suit.

12. The actions of the Defendants are malicious, devious, untrustworthy and accomplished for tortious intentional purposes to interfere with Plaintiffs right to purchase the premises of 50 Central Avenue, Ocean City, New Jersey.

13. The Plaintiffs have lost a mortgage and an advantageous percentage of interest of 9.5% due to the actions of the Defendants, Markwardt, Donald R. Sundstrom, Master, MacKerchar, 1st Peoples Bank of N.J., and Stuart.

14. The Defendants in conjunction and concert, have vitiated the sale of the premises to the Plaintiffs, and have caused the loss of fifty thousand dollars equity profit for their loss of bargain, and their actions have stranded over seven thousand dollars ($7,000.) worth of furniture and clothes, of Helen Dawson Sullivan: have costs in excess of two thousand dollars ($2,000.) liquidated damages for settlement costs, including termite inspection and damage repair, application fees, title reports and the like.

WHEREFORE, THE PLAINTIFFS DEMAND JUDGMENT AS FOLLOWS ON COUNT TWO:

1. For special damages of two thousand dollars ($2,000.) in liquidation damages; seven thousand dollars ($7,000.) loss of furniture and clothing of Helen Dawson Sullivan; and travel and hotel expenses of three settlement dates in excess of four hundred dollars ($400.00).
2. For compensatory damages of in excess of $50,000. for loss of the bargain of 50 Central Avenue, Ocean City, N.J., such computation arising from the actual sale price of the premises and the market value at the time of the settlement.
3. For general damages of mental anguish, stress, and emotional disturbance caused by the actions of the Defendants.
4. For trial by jury for intentional interference.
5. For punitive damages against the Defendants, Master, Markwardt, 1st Peoples Bank of N.J., MacKerchar, and Stuart for wilful, wanton, and reckless conduct, such damages requested are one million dollars ($1,000,000.) for malicious interference with the natural intent of Mary V. Sullivan, and the purpose of her trust fund.
6. For the costs of this suit, and any other relief which might be adequate and just.
7. Ten Thousand dollars, special damages, loss of West Atlantic City property, undersold to accommodate sale of 50 Central Avenue.

**COUNT THREE**

Count Three is directed by Plaintiffs against the Defendant Master, 1st Peoples Bank of New Jersey, MacKerchar, Stuart, Markwardt, Donald R. Sundstrom, and Thomas E. Sundstrom, and asserts a cause of action for breach of contract, and the terms of a Court Order.

1. Plaintiffs recount, restate, and really all of the allegations set forth in Counts One and Two, and by reference, makes them part of this Count.
2. Plaintiffs assert no cause of action against Defendant Harry F. Sundstrom, and join Harry F. Sundstrom only as an indispensible party to the action, due to his being a co-trustee of the Mary V. Sullivan Trust Fund.

3. Plaintiffs allege that the Defendants, severally, and severally and jointly, and acting in civil conspiracy and in concert, breached an agreement to sale trust property to James Sundstrom Sullivan, and Helen Dawson Sullivan, his wife by repudiating the terms of the court order of August 29, 1978, and its amendments.

4. At no time did the Plaintiffs repudiate the terms of the court order and to the contrary, conformed to the terms of a strict time element and against the specific interferences of the two attorneys, the Defendants Master and Markwardt, representing the Defendants Donald R. Sundstrom, and 1st Peoples Bank of New Jersey.

5. The Defendant Master operated a scheme to obtain a settlement in the Probate Court of Cape May County, by offering terms of settlement in cash, upon which he welched at a later date, bringing on an action in tort and contract in the Superior Court of New Jersey, Law Division, Camden County by Plaintiff James Sundstrom Sullivan.

6. Defendants breached the agreement on successive dates set down for settlement in December of 1978, in January of 1979, and again in February of 1979.

7. Defendant Thomas E. Sundstrom, in circumstances created by the Defendants, Master, 1st Peoples Bank of New Jersey, Stuart, MacKerchar, and unknown trust officers, again breached the agreement in May of 1979, causing the cancellation of the first mortgage by the Plaintiffs lending institution, causing loss of monies, and very great damage to Plaintiffs' financial situation, damaging his credit within and without the community of South Jersey and Maryland.

8. Defendants procured an ex parte order, in violation of court rule, and in excess of the jurisdiction of the courts of the United States granting power to the corporate trustee, the Defendant 1st Peoples Bank of New Jersey, to convey title, on a fraudulent move of the Defendant Master, and in complete disregard for the constitutional rights of the co-trustees of the estate of Mary V. Sullivan.

9. Said fraudulent order was procured before a valid order was procured and used to convince the title company to insure title, and the said actions of the Defendant Master was devious, and

unethical, and in direct violations of the cannons of the courts of New Jersey.

10. The mortgage commitment was cancelled by the Plaintiff's lending institution before a valid order to convey was procured.
11. The mortgage company cancelled Plaintiffs' mortgage commitment in total and complete frustration, and complained of the time and expense wasted by the parties involved.
12. The Defendant named maliciously interfered with the purchase of the premises by the Plaintiffs, and caused severe and substantial damage as a result.

WHEREFORE, THE PLAINTIFFS DEMAND JUDGMENT AS FOLLOWS:

1. As set forth in the Prayer for relief in Count Two of Plaintiffs' Original Complaint, and by reference makes it part of this prayer for relief, set forth specifically in paragraphs 1, 2, 4, 4, 6, excluding paragraph 5 for punitive damages.

Respectfully submitted,

James Sundstrom Sullivan
s/J.S.S.

Helen Dawson Sullivan
s/H.D.S.

## AFFIDAVIT

I, James Sundstrom Sullivan, of full age, and being duly sworn according to law, upon my oath, hereby depose and say

1. I am a co-plaintiff in the attached matter at law in contract and tort, and am a citizen of the State of Maryland, and a voter in the County of Charles, and have been for several years.
2. I am also a beneficiary and co-trustee of my own individual trust fund in the Mary V. Sullivan Trust Fund, and was an occupant in the property of 50 Central Avenue, Ocean City, New Jersey, until June 23, 1974, when Elsye Sundstrom Sullivan, my ex-wife had the police of Ocean City, N.J. expel me and my sales force from my own trust property at the advice of one Augustus S. Goetz, municipal judge in the City of Ocean City, N.J., now deceased. I lost a business which was grossing one hundred thousand dollars ($100,000.) per annum, and thousands of dollars I had borrowed from my own trust fund to finance.
3. I regained the property in deplorable state after the ex-wife and the occupants laid waste, causing in excess of twenty five thousand dollars ($25,000.) damages. Upon my attempt to repair the premises, I was again run out by the building inspector, who posted "condemned" signs without notice, or hearing, and in protest.
4. I suffered a heart attack in March of 1977, and could not pursue any type of activity which would violate my physician's orders, and the property sat idle for that period. The trust officer by the name of John Lyons was replaced, and my brothers forced the first intermediate accounting in eleven years, during which time, I cannot ever remember ever being credited with, or receiving any interests check from the corporate trustee.
5. The accounting manifested great distortions, and I filed exceptions and a counterclaim in tort, and breach of trust, and requested removal of the 1st Peoples Bank of N.J. as corporate trustee.
6. The trial judge was the same judge who upheld my alleged "criminal trespass" charge in the municipal court, from which I could not, and did not appeal, due to my having a coronary infarction, and the limitation having expired.
7. My agreement with my brothers to a settlement was to increase

the transfer price of the property from sixteen thousand nine hundred dollars ($16,900.) to twenty five thousand dollars ($25,000.) to offset the time difference and taxes paid, and I would restore the premises.

8. From the outset of the agreement with my brothers, the Defendant John J. Master, Jr., Esq. took great exception to the sale to me and the accounting manifested a charge to the trust fund of a thirteen thousand dollars ($13,000.) note, secured by a parcel of extremely valuable land, and the trust was invaded by the trust department to pay off the loan department of the 1st Peoples Bank of New Jersey in direct violation of State Law, and most expressly, without my permission as co-trustee.

10. My actions in the Superior Court is in discovery proceedings presently, and has withstood two summary judgment motions, and a motion for leave to appeal to the Appellate Division, and must as of course, go to a jury for issues of fact.

11. The sale of 50 Central Avenue, Ocean City, N.J. will result in a present loss of fifty thousand dollars ($50,000.) and the property is actually valued, with repairs of about twenty five thousand dollars ($25,000.), in excess of one hundred thousand dollars ($100,000.). I also have no place to put my eight children, who are paying in excess of one thousand dollars ($1,000.) monthly rent.

12. My present wife and myself have lost a great deal of money in the mortgage application, and the actions of these defendants with the exception of my brother Harry, have been extremely intimidating and expensive, causing loss of money and time.

s/J.S.S.

James Sundstrom Sullivan

Sworn to and subscribed before me
this 15th day of May, 1980

Notary Public of New Jersey

MY COMMISSION EXPIRES MAY 20, 1980

## AFFIDAVIT OF
## HELEN DAWSON SULLIVAN

I, Helen Dawson Sullivan, of full age, and being duly sworn according to law; depose and say:

1. I am the wife of James Sundstrom Sullivan, and we are both citizens of the State of Maryland, residing at Route 301, Box 205, Newburg, Maryland 20664, and have had such residence since January of 1977, having moved from Fayetteville, North Carolina.
2. That I agreed to purchase the premises of 50 Central Avenue, Ocean City, New Jersey from the Mary V. Sullivan Trust Fund, which is located and situate with the First Peoples Bank of New Jersey, Westmont, New Jersey, of which my husband, James Sundstrom Sullivan, was also beneficiary and co-trustee of the estate which held title to the property.
3. That my husband and myself sold valuable property in West Atlantic City, New Jersey to obtain funds to purchase the property for twenty five thousand dollars ($25,000.), for which we procured a first mortgage for the amount of seventeen thousand five hundred dollars ($17,500.) from the Collective Federal Savings and Loan Association, Egg Harbor City, New Jersey. We undersold the property for seven thousand dollars ($7,000.) when the property was worth in excess of twice that amount on the market but necessitated the funds immediately for settlement on December 22, 1978.
4. In addition to the funds from the sale of the land, I cashed in my life insurance with my carrier in Vermont, or New Hampshire, but received an additional seventeen hundred ($1,700.) in cash, and my husband and myself borrowed an additional two thousand dollars ($2,000.) in cash from the Commercial Credit Corporation in Waldorf, Maryland prior to settlement date on December 22, 1978.
5. Both my husband and myself took a trip at our expense to Haddonfield, N.J. but we were told by settlement firm that no deed was prepared, and that counsel for one of the trustees, Donald R. Sundstrom, refused to go to settlement due to a title search he wished to pursue. We returned home to Maryland, after arrangements were made for a second mortgage of in excess of

seventy five hundred dollars ($7,500.) so that we could keep the cash we had to open the premises up, and repair it.

6. We were also informed that the corporate trustee would not transfer the property due to a conversation with counsel for Donald R. Sundstrom, who claimed that his client had "superior rights" to the premises.

7. My husband had to go to court on several occasions prior to December 22, 1978 due to the fact that the counsel for the corporate trustee told the corporate trust officers not to give the key to the lending institutions appraiser, and that a firm commitment in writing must be in the office of the corporate trustee, but the bank could not issue a firm commitment until the bank's own appraiser evaluated the property. Both my husband and I knew that the bank and the two lawyers were trying to halt the sale of the premises to us for twenty five thousand dollars ($25,000.)

8. We reset the settlement date again in January of 1979, and the corporate trustee's lawyer again refused to prepare a deed, and the attorney for Donald R. Sundstrom refused to sign deed, and didn't even have the decency to let us know that the title search he had ordered had come in, and showed that the property was part of the Trust Fund, and that five signatures would be required to transfer the property. We again took a trip to Haddonfield, N.J., and there was no deed prepared.

9. Our firm commitment expired late in February of 1979, and we once again set down settlement date, but the Judge presiding had been beaten by a man on the front steps of the Court House in Cape May Court House, N.J., and the firm commitment expired which set down a percentage rate of 9.5% for the mortgage.

10. We obtained an extension for the mortgage commitment at 11.75 percent which required that we pay in excess of four thousand dollars ($4,000.) over the terms of the original mortgage, and the mortgage company was getting extremely frustrated at the actions of the two lawyers and the bank, and expressed that they did not want this type of confusion. They had a copy of the court order selling the home to James Sundstrom Sullivan, and the mortgage company required that I go on the deed, the mortgage, and the bond, as Mr. Sullivan's wife.

11. Both myself and Mr. Sullivan caused furniture valued at about

seven thousand dollars ($7,000.) to be moved into the property but upon arrival, it had to be placed into storage at great expense.

12. During the interim, another trustee, Thomas E. Sundstrom, whose individual trust is solvent, was caught in a fire in Pennsylvania, and the corporate trustee refused to help him, and Mr. Sullivan went to a Philadelphia hospital and brought him back, as he had a broken leg in two places, and had no money, clothes, or car and had no subsistence.

13. I was a witness to the abuse suffered by Thomas E. Sundstrom, and Mr. Sundstrom did not want any more cash put into the individual trust for him, as they abused the trust by his condition of plight, and thrusted the support and care for him unto James Sullivan, my husband, when Mr. Sullivan was trying to hold all of his assets for the purchase of the home. Mr. Thomas Sundstrom told me directly that he would not sell the home, if the funds went into the 1st Peoples Bank of New Jersey.

14. I again went to Haddonfield, N.J., with my husband on another date in a later month of that year, and had the second mortgage and the first mortgage arranged, and we were told that Thomas E. Sundstrom refused to sign the deed, because of what happened in the fire, and his treatment by the corporate trustee, and the lawyer for the bank, and referred to him as a liar, and a devious man.

15. Both Mr. Sullivan and myself have suffered through anguish, and unecessary anticipation, and have spent monies on travel, settlement costs, termite damage, termite inspection, and other requirements to procure the mortgage on 50 Central Avenue, Ocean City, N.J.

16. Our furniture is in storage at great expense, and is now close to the premises where we expected to move it, but the actions of the bank, their lawyer, Donald R. Sundstrom, and his lawyer, and finally Thomas E. Sundstrom, who blames the bank have contributed to great loss in cash, the property we sold, our furniture, and travel expenses to procure a settlement. We were there ready, and willing, and able on each instant, but the bank and the Sundstrom brothers appear from my observations to be at right angles and opposing each other.

17. At the present time, the mortgage monies are extremely difficult to obtain, and my husband's and my credit was strained because

of the expense, and the added expense of supporting Thomas E. Sundstrom who was then the responsibility of the trust fund.

18. At the present time, the interest rate on the property is out of range, and the first mortgage was arranged on property which had been boarded up by the City of Ocean City. There appears to be no way of obtaining another mortgage due to lack of funds, interest rates, and the lack of desire of a lending institution to mortgage the property in its present condition.

19. In addition, and most importantly, this transaction, and the actions of the Sundstrom brothers, the bank, the bank's lawyer, and Mr. Donald R. Sundstrom's lawyer have caused great and substantial harm to Mr. Sullivan's personal relationship and mine, and have caused unnecessary stress and emotional trauma, which didn't have to be if settlement had have taken place on schedule. We are now paying rent in two places, in lieu of paying one mortgage payment on the property which a court order allowed my husband to purchase.

Helen Dawson Sullivan

Sworn to and subscribed before me this
17th day of May, 1980

Notary Public of Maryland

My commission expires July 1, 1982

STATE OF NEW JERSEY

SS

COUNTY OF ATLANTIC

I, Simon Waksberg, of 427 N. Douglas Avenue, Margate, New Jersey, of full age, and being duly sworn according to law, hereby depose and say:

1. That I am the owner of Mainland Auto Sales, Inc., of 717 New Road in Somers Point, N.J. 08244, and as such am solvent.

2. That I have known James Sundstrom Sullivan of Ocean City, N.J. for a number of years.

3. That I was prepared, ready, willing and able to write a ten thousand dollar ($10,000.) second mortgage on the property of 50 Central Avenue, Ocean City, N.J. 08226 on the dates of December 22, 1978; January 19, 1979; February 17, 1979 and finally on May 16, 1979.

4. Mr. Sullivan could not obtain a valid deed from the other brothers, and the bank which was handling the transaction, so I could not write the second mortgage.

s/S.W.
Simon Waksberg

Sworn to and subscribed before me

this 10th day of June, 1979

Notary Public of N.J.

My commission expires

## APPENDIX X

## DEFENDANT THOMAS E. SUNDSTROM'S ANSWER TO PLAINTIFF'S COMPLAINT AND CROSS CLAIM

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

JAMES SUNDSTROM
SULLIVAN, ET AL,

Plaintiffs

Vs. HON. JOHN F. GERRY USDJ

CIVIL ACTION#80-1554

THE FIRST PEOPLES
BANK OF NEW JERSEY,
ET ALS,

Defendants

### DEFENDANT THOMAS E. SUNDSTROM'S ANSWER TO PLAINTIFFS' COMPLAINT AND CROSS CLAIM

By way of answer to the Plaintiffs' Complaint filed above, the Defendant, Thomas E. Sundstrom, residing at G-30 of Neshaminy Green Apartments, 3000 Ford Road, Bristol, PA. says:

COUNT ONE

Defendant Thomas E. Sundstrom admits that Plaintiffs are citizens of the State of Maryland, and the amount involved is in excess of ten thousand dollars ($10,000.) in response to the jurisdictional paragraph. Defendant Thomas E. Sundstrom also admits to all of the allegations of Count One of the Complaint, and further admits that the property of 50 Central Avenue, Ocean City, NJ was to be in the individual trust fund of James Sundstrom Sullivan, and such agreement was advanced, certified and signed in the offices of the Provident Trust of

Philadelphia, PA, and was so agreed by all of the brothers, Harry, Donald, Thomas, and James.

COUNT TWO

Defendant Thomas E. Sundstrom admits all of the allegations in Count Two, including the preamble to Count Two. Defendant Thomas E. Sundstrom disclaims that he is represented by the law firm of Tuso, Gruccio, Pepper, Buonadonna, Giovinazzi, and Butler. Defendant Thomas E. Sundstrom states that he is unrepresented in the above action, and admits to all claims and counts filed by the Plaintiffs, I do not wish to be represented by the Bar Association.

COUNT THREE

Defendant Thomas E. Sundstrom admits to all of the allegations in Count Three, including the preamble of said count, and further declares that he is not represented by any counsel, and has informed the law firm of Tuso, Gruccio, Pepper, Buonadonna, etc. of Vineland, NJ that he resents their unauthorized representation, and demands their withdrawing his name from their pleadings.

WHEREFORE, THE DEFENDANT, THOMAS E. SUNDSTROM ADMITS TO THE CLAIMS, AFFIDAVITS AND OTHER PLEADINGS OF THE PLAINTIFFS, AND DEMANDS THAT JUDGMENT BE ENTERED AGAINST HIM ON ALL COUNTS AS SET FORTH IN THE PLAINTIFFS' COMPLAINT.

Respectfully submitted,

s/T.E.S.

Thomas E. Sundstrom, Trustee
Mary V. Sullivan Trust Fund
217-788-7055

## AFFIDAVIT

I, Thomas E. Sundstrom, of G-30 Neshaminy Green Apartments, 3000 Ford Road, Bristol, PA hereby certify and say:

1. I am the same Thomas E. Sundstrom named as beneficiary and co-trustee of my own trust fund, account number 004 Woodbury, NJ set forth in the last will and testament of Mary V. Sullivan, my mother.
2. I did not hire the law firm of Tuso and Gruccio, et als of Vineland, New Jersey as all of the facts and allegations in my brother James complaint filed in this court are true, nor did they serve me any papers whatsoever.
3. I was left helpless by a fire in December of 1978, and requested aid from the Corporate Trustee, the First Peoples Bank of NJ and was refused; with $17,800 in my account, although I was out on the streets of Philadelphia with a broken leg, no money, cars, clothes, home or the like, destitute and at their mercy.
4. My brother Jimmy was the only one who came to my aid, and the circumstances that followed ranged from my being put into jail on three occasions, with the corporate trustee trying to stop the sale of 50 Central Avenue, Ocean City, NJ.
5. The tactician behind this was an attorney named John J. Master, who undermined the transaction of my obtaining money to aid in my financial plight, for fear that I would help my brother Jimmy to purchase the premises. When the bank refused the keys to the mortgage company's appraiser, I was present.
6. I know for a fact that James and Helen Sullivan had the financing to buy the premises, but after the treatment by the bank, I informed James and Helen Sullivan I would not sign the deed, as I did not want the proceeds in the bank, and that I wanted to take a mortgage back running to the buyers, to protect the equity, so that it would not be put in the First Peoples Bank of New Jersey and thereafter into their common stock.
7. I consider the First Peoples Bank thieves, and their counsel, John J. Master unconscionable and devious liar.
8. I have just returned from the State of Michigan as a result and learned of this law suit, having been given personally papers by this law firm of Tuso, and Gruccio of Vineland, and I told them I didn't want their representation. This was two weeks

ago, September 23, 1980.

9. This law firm has caused confusion in my defense, and also represents the bank which has caused all of this.
10. I incorporate all of the allegations and affidavits of the Plaintiffs in this matter, and admit to all of them, as they are truthful, to the best of my knowledge.
11. I went to the Honorable Nathan Staller, Judge of the Probate Court, Cape May Court House, who told me that I would have had help, if I didn't join my brother James in the law suit he instituted for fraud in trust funds against the First Peoples Bank of NJ, when I told him my brother was right, and the First Peoples Bank of NJ had invested only funds in violation of the last will and testament of my mother relief was given.
12. I was a political prisoner of the bank and its agents and put into jails and institutions and held incognito and refused aid under the last will and testament of Mary V. Sullivan my mother, thereby denying all my consitutional rights.

s/T.E.S.

Thomas E. Sundstrom

Sworn to and subscribed before me this 3rd day of October, 1980

Judith I. Burkart

Notary Public of Pennsylvania

My commission expires April 16, 1984

## CROSS CLAIM FOR COUNTRIBUTION

## JURISDICTION PARAGRAPH

Jurisdiction is conferred by 28 USC 1332 as defendant Thomas Sundstrom is a citizen of Pennsylvania and defendants First Peoples Bank of NJ, Master, Mackerchar, Stuart are citizens of New Jersey. The amount involved is in excess of $10,000 exclusive of intents and costs.

Jurisdiction if also conferred by 28 USC 1343 and 42 USC 1983; 42 USC 1985 as defendants have used color & guise of State Authority under trust laws to deprive him of civil and constitutional rights.

Defendant, Thomas E. Sundstrom, individual, and co-trustee of the Mary V. Sullivan Trust Fund, on cross claim hereby says:

1. The First Peoples Bank of New Jersey refused to exercise discretion in advancing funds for the welfare and support of the beneficiary Thomas E. Sundstrom after a fire in Pendel, PA on December 17, 1978.

2. The support of the beneficiary was fettered by the Defendants Master, Stuart, and MacKerchar acting as agents on behalf of the bank.

3. The actions of the Defendants First Peoples Bank of NJ continued through January, and then February of 1979, while Beneficiary Trustee Sundstrom was incarcerated in the State of Maryland, and further continued in March and April of 1980, while the Beneficiary-Co-Trustee was again jailed in the State of New Jersey, destitute with money in the bank.

4. The actions of Defendants First Peoples Bank of New Jersey continued with the same beneficiary has in excess of seventeen thousand dollars ($17,000.) in trust, in addition to property.

5. Said funds were invested without any knowledge of the beneficiary trustee, and were invested in a **common stock for legal investments** issued by the First Peoples Bank of NJ, in violation of the last will and testament of the late Mary V. Sullivan.

6. Said investments were made without any consent or consulta-

tion or agreement of the other trustees of the trust fund.

7. The unlawful activities have continued for a period of years after repeated demands for an accounting were never satisfied.

8. Trustee Thomas E. Sundstrom did not want any of his funds invested in the First Peoples Bank of NJ's Common Stock for legal investments, and repeatedly demanded an accounting and income distribution.

9. The Defendants First Peoples Bank of NJ, MacKerchar, Master, and Stuart fraudulently concealed their activities from the Trustee Thomas E. Sundstrom.

10. The same defendants in third party action have fraudulently concealed their activities from the other trustees of the Mary V. Sullivan Trust Fund.

11. The sale of the premises to James and Helen Sullivan would have netted Thirty Five Thousand Dollars ($35,000.) into the coffers of the First Peoples Bank of NJ with no advantage to the other trustees of the Mary V. Sullivan Trust Fund.

12. The actions of the joint tortfeasors in contribution are continuing unrestrained.

13. Defendant Thomas E. Sundstrom prefers as a trustee to save the premises for a place to live, rather than to make the premises liquid to the advantage of the corporate trustee and its agents and representatives.

14. Defendant Thomas E. Sundstrom was forced to his actions of breaching the contract with James and Helen Sullivan by refusing to sign the deed.

15. The last will and testament gives powers to sell, mortgage, etc., to the trustees of the estate, not to the corporate trustee as an entity, and the actions of the Defendants First Peoples Bank of New Jersey, MacKerchar, Masters, and Stuart violated those terms.

WHEREFORE THE DEFENDANT THOMAS E. SUNDSTROM DEMANDS:

A. A declaratory judgment interpreting the last will and testament of Mary V. Sullivan, its terms, paragraph, and clauses and the like for the guidance of the trustees of the estate. (Attached as "A")

B. After such interpretation of said will, that the corporate trustee be held responsible for the breach of the terms of the court order, and the intentional interference of the mortgage of the Plaintiffs, and said responsibility to hold the Defendants First Peoples Bank of NJ, MacKechar, Master, and Stuart liable to the Plaintiffs in Counts One, Two and Three of the Plaintiffs' Original Complaint.

C. That said defendants pay for the costs of this suit.

D. For trial by jury on the cross claim for damages.

E. For any other relief which is adequate and just.

s/T.E.S.

Thomas E. Sundstrom

Dated: October 1, 1980

**AFFIDAVIT OF SERVICE**

I, Thomas E. Sundstrom, hereby certify that I have served a copy of the foregoing answer to the Plaintiffs' complaint, and a cross claim against the other defendants by service by ordinary mail, address to the Plaintiffs at Route 301, Box 205, Newburg, Maryland 20664; and to the law firm of Tuso and Gruccio, of 538 Landis Avenue, Vineland, NJ 08360, Att: Giovinazzi. Service to John Markwardt, Esq., 32 N. Black Horse Pike, Blackwood, NJ 08012.

s/T.E.S.

Thomas E. Sundstrom

## ATTACHMENT A

I, MARY V. SULLIVAN, of Ocean City, New Jersey, declare this to be my will, hereby revoking all former wills.

### 1. HOUSEHOLD AND PERSONAL EFFECTS AND REAL ESTATE

I give any automobiles, household and personal effects and other tangible personalty of like nature which I may own at my death to my son, Harry F. Sundstrom.

### 2. RESIDUE

I give the residue of my estate to my trustees to divide into four equal shares for my sons Harry F. Sundstrom, Thomas E. Sundstrom, James D. Sundstrom and Donald R. Sundstrom and to hold and distribute such shares as follows:

A. As to the shares of my sons Harry, James and Donald:

(1) **During Son's Life:** During the life of each son, my trustees shall pay him the income of his share, and shall have power to pay him from time to time so much of the principal thereof as my corporate trustee considers advisable for the support and welfare of my son and his issue.

(2) **On Son's Death:** On the death of each son, or on my death if the son does not survive me, my corporate trustee shall distribute the remaining principal of his share per stirpes to his then living issue, or in default of such issue shall add such principal to the trusts hereunder for my other sons, including my son Thomas, to be held and distributed as if I had died at that time.

B. As to the share of my son Thomas:

(1)**During Son's Life:** During the life of my son Thomas, my trustees shall pay him the income of his share, and shall have power to pay him from time to time so much of the principal thereof as my corporate trustee considers advisable for the support and welfare of my said son and his issue.

(2)**On Son's Death:** On the death of my son Thomas, or on my death if he does not survive me, my corporate trustee shall distribute the remaining principal of his share in equal shares to his son Mark,

his daughter Gail and any other children of my said son born hereafter, the share of any such child not then living to go to the child's then living issue and in default of such issue to be added to the other shares under this paragraph (2) or if none of the foregoing is then living to the trusts hereunder for my other sons, to be held and distributed as if I had died at that time.

### 3. MINORITY AND DISABILITY

In order to avoid court proceedings for the appointment of guardians I direct that if any beneficiary hereunder is a minor or in the opinion of my corporate trustee is unable to handle his or her affairs because of advanced age, illness or other condition, my corporate trustee shall during such minority or disability retain whatever share of income or principal such beneficiary otherwise would have received under the foregoing provisions and apply so much of such share as such trustee considers advisable for the beneficiary's support, education and welfare, accumulating any income not needed for these purposes.

### 4.PROTECTIVE PROVISION

No interest hereunder shall be assignable by the beneficiary or available to anyone having a claim against the beneficiary.

### 5. TAX PROVISION

All estate, inheritance and other death taxes (including interest and penalties thereon, if any) imposed because of my death with respect to the property included in my gross estate for tax purposes shall be paid at such time or times as my executor and trustees think proper and charged against the principal of my general testamentary estate as if such taxes were my debts, except that such taxes with respect to property in my residuary estate shall be charged against the principal of the particular share with respect to which the taxes are imposed.

### 6. POWERS OF EXECUTOR AND TRUSTEES

In addition to powers granted by law, my executor and trustees shall have the following powers exercisable at discretion from time to time without court approval with respect to both principal and accumulated income and such powers shall continue until distribution is actually made:

(a) **Sale, etc.:** To sell at public or private sale, to exchange or to

lease for any period of time, any real or personal property, and to give options for sales or leases.

(b)**Borrowing:** To borrow money and to mortgage or pledge any real or personal property.

(c) **Compromises:** To compromise claims.

(d) **Investments:** To accept in kind, retain and invest in any form of property without being limited to legal investments, including common trust funds.

(e)**Principal and Income:** To allocate receipts and expenses to principal or income or partly to each as my corporate trustee from time to time thinks proper in cases where in such trustee's opinion the law concerning such allocations is uncertain, unfair or impractical as applied to any particular item in the particular circumstances.

## 7. EXECUTOR AND TRUSTEES

**(a) Appointment:** I appoint Provident National Bank executor and trustee of all trusts hereunder, and I appoint each of my sons co-trustee of the trust for his benefit.

(b) **Compensation:** The compensation of my corporate executor and trustee shall be in accordance with its schedule of fees in effect from time to time during the period over which its services are performed.

(c) **Bond:** No executor or trustee shall be required to file a bond in any jurisdiction.

Executed on May 17, 1967.

s/M.V.S.

Mary V. Sullivan (SEAL)

In our presence MARY V. SULLIVAN signed this and declared it to be her will, and now at her request, in her presence and in the presence of each other, we sign as witnesses:

_____ Residence _____

_____

_____ Residence _____

_____

_____ Residence _____

## APPENDIX Y

## PLAINTIFFS' NOTICE OF MOTION DATED OCTOBER 8, 1980

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

JAMES SUNDSTROM
SULLIVAN, ET AL,

Plaintiffs Hon. John F. Gerry/USDJ

vs. CIVIL ACTION NO. 80-1554

THE FIRST PEOPLES
BANK OF N.J., ET ALS,

Defendants

### PLAINTIFFS' NOTICE OF MOTION

TO: Thomas E. Sundstrom, Pro Se., G-30 Nashiminy Green Apartments, 3000 Ford Road, Bristol Pa. 19007

Cosmo Giovinazzi, III, Esq., 538 Landis Avenue, Vineland, N.J.

PLEASE TAKE NOTICE THAT THE PLAINTIFFS will move the Court on Friday, November 7, 1980, at 9:00 A.M., prevailing time, or as soon thereafter as counsel may be heard at the U.S. Court House in Camden, N.J., for an order to:

1. Extend the time for discovery proceedings for a period of ninety (90) days, running from November 7, 1980 until ninety days hence.

2. For an order granting summary judgment against the Defendant Thomas E. Sundstrom based on the answer filed by the same hereto attached, such order granting only partial summary judgment solely against Thomas E. Sundstrom, and not the other defendants, for which trial by jury has been demanded.

3. For an order attaching, or impounding any monies from the sale of the premises of 50 Central Avenue, Ocean City, N.J., to be

placed in the custody of the United States District Court until the final adjudication of the issues at bar. Plaintiffs rely on the supporting affidavits of the Pleadings filed attached to the Plaintiffs' Original Complaint, and the answer of Thomas E. Sundstrom, with affidavits attached thereto.

Respectfully submitted,

Dated: October 9, 1980

s/J.S.S.
James Sundstrom Sullivan

## CERTIFICATION

A copy of the foregoing notice of motion has been served upon Cosmo Giovinazzi III, Esq., of the law firm of Tuso and Gruccio of 538 Landis Avenue, Vineland, N.J. 08360 by ordinary mail; and upon Thomas E. Sundstrom, pro se, of Apt G-30, Nashiminy Green Apts. 3000 Ford Road, Bristol, Pa. 19007, by certified mail RRR.

s/J.S.S.
James S. Sullivan

## APPENDIX Z

## ORDER DENYING ATTACHMENT FILED NOVEMBER 18, 1980

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

JAMES SUNDSTROM SULLIVAN,
and HELEN DAWSON SULLIVAN,

Plaintiffs HON. JOHN F. GERRY, USDJ

vs. CIVIL ACTION NO. 80-1554

THE FIRST PEOPLES BANK OF N.J.,
ET ALS,

Defendants

### ORDER DENYING ATTACHMENT

PLAINTIFFS HAVING MOVED THE COURT FOR PARTIAL SUMMARY JUDGMENT, AND ATTACHMENT against the Defendant Thomas E. Sundstrom and the Defendant First Peoples Bank of New Jersey having filed an affidavit questioning the mental competency of Defendant Thomas E. Sundstrom regarding his filing an answer to the Plaintiffs' Original Complaint admitting to all of the claims of the Plaintiff and the Plaintiffs raising no objection to Defendant Thomas E. Sundstrom obtaining from his own physician in Pennsylvania a letter attesting to the mental competency of the same Thomas E. Sundstrom the Plaintiffs Motion for Partial Summary Judgment is hereby continued until a future day which is convenient to the parties.

IT IS FURTHER **O R D E R E D** on this 18 day of November, 1980, after due consideration, that the Plaintiffs motion for attachment of the funds held by the Defendant 1st Peoples Bank of New

Jersey obtained from the sale of the trust property known as 50 Central Avenue, Ocean City, N.J., is hereby denied.

**SO ORDERED:**

s/J.F.G.
HON. JOHN F. GERRY, USDJ

## CERTIFICATION OF SERVICE

Copies of the foregoing order denying attachment, and ordering continuance of partial summary judgment against the Defendant Thomas E. Sundstrom have been served upon Thomas E. Sundstrom, Pro Se, certified RRR; and upon Cosmo A. Giovinazzi III, Esq., and John J. Markwardt, Esq., by ordinary mail, addressed respectively to G-30 Nashaminy Green Apartments, 3000 Ford Road, Bristol, Pa. 19007; 538 Landis Avenue, Vineland, N.J. 08360; and P.O. Box 354, Blackwood, N.J. 08012.

s/J.S.S.
James Sundstrom Sullivan

## APPENDIX AA

## ORDER TO EXTEND DISCOVERY FILED NOVEMBER 18, 1980

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

JAMES SUNDSTROM SULLIVAN, and HELEN DAWSON SULLIVAN,

Plaintiffs — HON. JOHN F. GERRY, USDJ

vs. — CIVIL ACTION NO. 80-1554

THE FIRST PEOPLES BANK OF N.J., ET ALS,

Defendants

### ORDER TO EXTEND DISCOVERY

THIS MATTER having been brought on by notice of motion by the Plaintiffs, and it appearing that no objection having been raised by any of the Defendants thereto; and in the presence of Thomas E. Sundstrom, pro se; and the law firm of Tuso and Gruccio et als of 538 Landis Avenue, Vineland, N.J., Cosmo A. Giovinazzi, Esq., appearing in behalf of the Defendants First Peoples Bank of New Jersey, Donald R. Sundstrom, Harry F. Sundstrom, Trustees of the Mary V. Sullivan Trust Fund; and notice having been given of the application to John J. Markwardt, Esq., pro se, and the same having filed no objection thereto;

IT IS ON THIS 18 DAY OF NOVEMBER, 1980,

O R D E R E D:

That the discovery period in the above entitled matter is hereby, and the same is hereby extended ninety (90) days from the date of this order.

**SO ORDERED:**

s/J.F.G.
Hon. John F. Gerry, U.S.D.J.

**CERTIFICATION OF SERVICE**

I, James Sundstrom Sullivan, hereby certify that I have served a copy of the foregoing order to extend discovery period upon Thomas E. Sundstrom, pro se certified, return receipt, addressed to Apt/ G-30, Nashiminy Green Apartments, 3000 Ford Road, Bristol, Pa. 19007; and upon the law firm of Tuso and Gruccio, et als, to the attention of Cosmo A. Giovinazzi, III, Esq., of 538 Landis Avenue, Vineland, N.J. 08360; and upon John J. Markwardt, Esq., Pro se of P.O. Box 364, Blackwood, N.J. 08012 by ordinary mail.

s/J.S.S.
James Sundstrom Sullivan

## APPENDIX BB

## AFFIDAVIT IN PARTIAL OPPOSITION TO PLAINTIFFS' MOTION

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

JAMES SUNDSTROM
SULLIVAN and HELEN
DAWSON SULLIVAN,

HON. JOHN F. GERRY, U.S.D.J.

CIVIL ACTION NO. 80-1554

FIRST PEOPLES BANK
OF NEW JERSEY, ET ALS.

STATE OF NEW JERSEY:

SS

COUNTY OF CUMBERLAND:

COSMO A. GIOVINAZZI, III, being duly sworn, accordingly to law, upon his oath, deposes and says:

1. I am a member of the law firm of Tuso, Gruccio, Pepper Buonadonna, Giovinazzi & Butler, PA, attorneys for defendants, First Peoples Bank of New Jersey, the Mary D. Sullivan Trust Fund, Donald R. Sundstrom, Trustee, Harry S. Sundstrom, Trustee, John J. Master, Jr., Esquire, Janet Stewart, and Surtees MacKerchar in the above-entitled action. We have also filed an Answer on behalf of Thomas E. Sundstrom, Trustee, and have recently been noticed by Mr. Sundstrom that he does not desire the representation of our law firm in this action. Concurrent with that notice, Mr. Sundstrom filed his own Answer to plaintiff's Complaint in which he admits all of the allegations of all three Counts.

2. I have no objection to plaintiff's motion to extend time for

discovery for a period of 90 days and consent to the extention of the discovery.

3. I object to an Order granting partial summary judgment to the plaintiff, James Sundstrom Sullivan, based on the Answer which Thomas E. Sundstrom filed with the Court on or about October 1, 1980. At the time our firm filed an Answer on behalf of Thomas Sundstrom in this matter, I had been advised that Mr. Sundstrom was in the State of Michigan and filed an Answer on behalf of the above indicated defendants, including Mr. Sundstrom, in order to avoid a default being taken against any of the Trustees of the Mary D. Sullivan Trust, which is administered by the First Peoples Bank of New Jersey.

4. Subsequently, in July of 1980, I forwarded Mr. Sundstrom a copy of said Answer together with a letter advising of our representation and indicating that he could seek his own representation should he desire to do so.

5. Subsequently, Mr. Sundstrom returned from Michigan and came to our office for copies of his "papers" at which time I provided him with another copy of the Answer filed in this matter on behalf of the several defendants named.

6. Based upon the many letters which Thomas Sundstrom has written to First Peoples Bank and its representatives, including John J. Master, Jr., Esquire, over the past two years and the actions of Mr. Sundstrom as described to me by members of the Trust Department of the First Peoples Bank, I believe that Mr. Sundstrom may be mentally incompetent and unable to handle his affairs.

7. Based upon the pleadings filed in this matter by Thomas Sundstrom, I believe it is possible that his brother, James Sundstrom Sullivan, the plaintiff in this action, may be using Thomas Sundstrom for his own purposes, and may have prepared for the said Thomas Sundstrom or helped him to prepare the Answer in which he admits all of the allegations of plaintiff's Complaint, together with the Affidavit submitted therewith.

8. Under the circumstances, I would request this Court not to enter a Judgment against defendant, Thomas Sundstrom as requested by plaintiff, James Sundstrom Sullivan, and further request the Court to consider ordering a psychiatric examination of Mr. Thomas Sundstrom to determine his competency before accepting the Answer which

he has filed.

9. The undersigned, as attorney for the several defendants named, further objects to an Order attaching or impounding monies from the sale of premises at 50 Central Avenue, Ocean City, New Jersey, until the final adjudication of the issues in this case. As indicated in the Answer and Separate Defenses filed in response to plaintiff's Complaint, defendant, First Peoples Bank of New Jersey and all other defendants, have denied plaintiff's claims and have asserted that the premises in question were ordered sold pursuant to a Court Order after several hearings were held before the Honorable Nathan Staller, J.S.C., in the Superior Court of New Jersey, Cape May County, Law Division-Probate Part. There is no legal basis for the money from the sale of the aforesaid property to be impounded or otherwise attached, and the answering defendants believe that plaintiff's suit is frivolous and is an attempt to do in the Federal Court that which he was unable to do in the State Court.

10. The monies from the sale of 50 Central Avenue, Ocean City, New Jersey, should be turned over to the corporate trustee, First Peoples Bank of New Jersey, in order that same may be administered as a part of the Mary D. Sullivan Trust. Since First Peoples Bank of New Jersey, as corporate trustee, is responsible for the administration of said Trust Fund, it would be liable to surcharge in the event of a misappropriation or misuse of any funds invested in the Trust. Accordingly, it is respectfully submitted that there is no legal or factual basis to attach, impound, or restrain the monies from the sale of premises at 50 Central Avenue, Ocean City, New Jersey.

s/C.A.G.

COSMO A. GIOVINAZZI, III

SWORN AND SUBSCRIBED TO
BEFORE ME THIS 27 DAY OF OCTOBER, 1980

s/C.A.C.
CAROL A. COCCA
A Notary Public of New Jersey
My Commission expires Jan. 22, 1984

## APPENDIX CC

## LETTER FROM JAMES S. SULLIVAN TO TUSO, GRUCCIO, PEPPER ET ALS FILED SEPTEMBER 15, 1980

Route 301 Box 205
Thunderbird Professional Bldg.
Newburg, Maryland 20664

Tuso, Gruccio, Pepper, et als
Att: Cosmo A. Giovinazzi, Esq.
538 Landis Avenue
Vineland, N.J. 08360

John J. Markwardt, Esq.
P.O. Box 364
Blackwood, N.J. 08012

Re: Sullivan et al vs 1st Peoples Bank of N.J., et als
C.A. # 80-1554 Depositions

Gentlemen:

Prior to actual notice thereof, I am writing to each of you respectively as to a convenient time and place for depositions on Harry F. Sundstrom, Thomas E. Sundstrom, and Donald R. Sundstrom.

Also, please be advised that P.O. Box 269, Newburg, Maryland 20664 is not for service of process in this matter as the complaint filed does not set forth such an address. That box was closed in January of 1979 in speculation of the purchase of 50 Central Avenue, Ocean City, N.J. 08226. The post office has sent all mail back according to them. The proper address is set forth above. The address in Ocean City, N.J. on Baby History Plan, is P.O. Box 634, Ocean City, N.J. 08226. I will accept service of any pleadings or correspondence at that address also. In addition, any certified mail is not necessary, as the Post Office in Newburg, Maryland opens at 9:00 A.M. and closes at 4:30 P.M. with several hours of closing during the day. Mail delivery to the Thunderbird Professional Bldg. is by rural carrier, and ordinary mail rather than certified is preferred, as my wife is custodian of the building.

If I do not hear from you as to time and place, I will proceed as per rule without your cooperation.

Very truly yours,

s/J.S.S.
James S. Sullivan

JSS/fm

## APPENDIX DD

## PLAINTIFFS' NOTICE OF MOTION UNDER RULE 60(a) TO CURE DEFECT IN SERVICE OF PROCESS OF ORDERS ENTERED DATED OCTOBER 21, 1983

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

JAMES SUNDSTROM SULLIVAN, and HELEN DAWSON SULLIVAN
Plaintiffs

GERRY, J.

Civil Action

vs.

NO. 80-1554

THE 1st PEOPLES BANK OF NEW JERSEY, ET ALS,
Defendants

## PLAINTIFFS' NOTICE OF MOTION UNDER RULE 60(a) TO CURE DEFECT IN SERVICE OF PROCESS OF ORDERS ENTERED

TO: Cosmo A. Giovanizzi, Esq.: 538 Landis Avenue, Vineland, N.J. P.O. Box 160

John J. Markwardt, Esq.: Horn, Goldberg, et als, P.A. 1300 Atlantic Avenue, Suite 500 Atlantic City, N.J. 08401

Thomas E. Sundstrom : 3441 W. 88th Street, Apartment #3 Anchorage, Alaska 99502

PLEASE TAKE NOTICE THAT ON Friday, November 18, 1983, the Plaintiffs' will move the Court to correct the defect in service of process of two orders entered to wit:

1. On the date of 7/13/83, the Court, Gerry, J. entered an order denying Plaintiffs' Motion with affidavits to reinstate the Plaintiffs' Original Complaint; and Plaintiffs' Motion for Summary Judgment

against Thomas E. Sundstrom as moot.

2. On July 14, 1983, the Court, Gerry J. entered an order dismissing the Counterclaims of Defendants 1st Peoples Bank of New Jersey, John J. Master, Jr., Esq.; and John J. Markwardt, Esq.; in addition to the dismissal of the cross claim of Thomas E. Sundstrom.

Plaintiffs move that an order be entered requiring proper service of process of the two orders entered by the Court by the proper procedures by the Court, and/or the Defendants in the above manner, and that the entry of such order correcting the defect toll the running of time for filing an appeal to the United States Court of Appeals for all claims and issues of all parties.

Plaintiffs rely on the docket entries and supporting affidavits attached hereto, with exhibits.

Respectfully submitted,

s/J.S.S.
James Sundstrom Sullivan

s/H.D.S.
Dated: October 21, 1983 Helen Dawson Sullivan

## AFFIDAVIT OF JAMES AND HELEN SULLIVAN

JAMES AND HELEN SULLIVAN, husband and wife, of full age, and being duly sworn, hereby depose and say:

1. We are the Plaintiffs in the matter of Sullivan et al v. The First Peoples Bank of N.J., et als, C.A. #80-1554(G).

2. We move the Court, Gerry J. for reinstatement, on advisement of James F. Hammill, United States Magistrate, posterior to a pre-trial hearing called by the same, and the motion was returnable on court order to the date of 6/17/83. The motion was denied.

3. James Sullivan called the Court on or about mid October, 1983 to ascertain the disposition of the motions pending, for which the U.S. Court of Appeals sent the matters back for final adjudication of all claims and multiple parties, and was told that the docket had been sent to Trenton, N.J. to the dead files.

4. A clerk sent to me the docket entries of the matter, showing that the address of P.O. Box 634, Ocean City, N.J. had been typed out, and P.O. Box 98, Faulkner, Maryland had been added to the address caption. The docket entries (exhibit "A") showed that two entries had been added to the column for which James and Helen Sullivan had no copies to notification sent to them. The lack of notice is clearly error, even though the docket entries show that notice had been given, but fails to show notice to who, or what address.

5. We have received no notice of these two orders through P.O. Box 634, Ocean City, N.J. 08226, and we have moved to New Jersey from Maryland in January of 1981 or thereabouts. We have repeatedly received correspondence from the Federal Court in Camden, N.J. addressed to P.O. Box 634, Ocean City, N.J. 08226, and the Honorable James F. Hammill, as well as the Honorable John F. Gerry, received correspondence, and mailed correspondence to P.O. Box 634, Ocean City, N.J. 08226. We have included an order to be signed and also included a returned envelope, post prepaid, for the return of the order included in the motion for reinstatement.

6. We have received no forwarding from P.O. Box 98, Faulkner,

Maryland 20632, as to any mail from the United States District Court in Camden, N.J. 08101.

7. We attach correspondence mailed to, and received from the Federal Court in Camden, N.J. directly related to this matter, which also includes correspondence of very recent origin from both attorneys in the matter. All show P.O. Box 634, Ocean City, N.J. 08226, as the proper address for service of orders, processes, and motions and pleadings.

8. There can be no mistake in the minds of these affiants that the instant matters are being prejudiced by clerk's errors in service of process of the two final orders which closed this matter on 7/14/83, without knowledge, notice, or any hearing set down by the court, although the motions were allowed to hand in limbo for more than two years before the Court ruled on them.

s/J.S.S.
James Sundstrom Sullivan

s/H.D.S.
Helen Dawson Sullivan

Sworn to and subscribed
before me this 24th day of
October, 1983

Dianne C. Migliaccio
Notary Public of N.J.

My commission expires January 18, 1987

# COPIES OF ENVELOPES ADDRESSED TO JAMES SUNDSTROM SULLIVAN

PA 308

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Attorney at Law
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Blackwood, New Jersey 08012

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James Sundstrom Sullivan and Helen Dawson Sullivan
PO Box 634
Ocean City NJ 08226



BEST AVAILABLE COPY

Hon. James F. Hamill
United States Magistrate
Chambers, U.S. Court House
Camden, N.J. 08101

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PA 304

JAMES AND HELEN SULLIVAN
P.O. BOX 634
OCEAN CITY, N.J. 08226

20

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A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
SUITE 500 CITICENTER BUILDING
200 ATLANTIC AVENUE
ATLANTIC CITY, NEW JERSEY 08401

30

NEWARK

Mr. James Sundstrom Sullivan
P.O. Box 634
Ocean City, New Jersey 08226

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UNITED STATES DISTRICT COURT
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CAMDEN, NEW JERSEY 08101

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Mr. James Sundstrom Sullivan
P. O. Box 634
Ocean City, New Jersey

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MAIL

| PLAINTIFFS | DEFENDANTS |
| --- | --- |
| JAMES SUNDSTROM SULLIVAN and HELEN DAWSON SULLIVAN | THE 1st PEOPLES BANK OF NEW JERSEY, THE MARY V. SULLIVAN TRUST FUND, THOMAS E. SUNDSTROM, Trustee DONALD R. SUNDSTROM, Trustee HARRY F. SUNDSTROM, Trustee JOHN J. MASTER, JR., Esq. (A New Jersey Attorney at Law), JOHN J. MARKWARDT, Esq., (A New Jersey Attorney at Law), JANET STUART, AND SURTEES MacKERCHAR (Trust Officers of the 1st Peoples Bank of New Jersey) |
| Breach of Contract. | MCO |

CAUSE

---

ATTORNEYS

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~~Ocean City, New Jersey 08226~~
~~(609) 399-8291~~

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For: All defendants except John N. Markwardt, Esq. and Thomas E.

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Thomas E. Sundstrom, Pro se
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Anchorage, Alaska 99501
(907) 277-2595
248-3470

| | | |
|---|---|---|
| 5-29-80 | 1 | Complaint filed |
| 5-29-80 | 2 | Notice of Allocation and Assignment, filed |
| 5-29-80 | 3 | Plaintiffs' Motion for Special Appointment of Process Server, filed |
| 5-29-80 | 4 | Order for Service of Process, filed. (Gerry). |
| 5-29-80 | | Summons Issued |
| 6-18-80 | 5 | **Answer** and Separate Defenses of all defendants except John N. Markwardt, Esq., together with Counterclaim, filed |
| 6-27-80 | 6 | **Answer** of Mark J. Markwardt, Esq, Pro se, and Counterclaim, filed |
| 9-29-80 | 7 | Notice of change of mailing addresses of Plaintiff, filed |
| 10-9-80 | 8 | **Answer** of Deft. Thomas E. Sundstrom; Affidavit; Crossclaim for contribution; and **Demand for Trial by Jury,** filed 10-6-80 |
| 10-15-80 | 9 | Notice of Motion by Pltfs. for an Order extending time of Discovery for ninety (90) days; granting Summary Judgment against Deft. Thomas E. Sundstrom; and, attaching or impounding any monies from the sale of the premises of 50 Central Ave., Ocean City, N.J., filed 10-14-80 (Affidavits) |
| 10-24-80 | 10 | Request and Affidavit of Defts.-Counterclaimants John J. Master, Jr. & First Peoples Bank of New Jersey to enter Default as to Plts. for failure to plead or otherwise defend the Counterclaim, filed 10-22-80 |
| 10-24-80 | | Default as to Plaintiffs for failure to plead or otherwise defend the Counterclaim, entered. |
| 10-27-80 | 11 | **Answer** of Defts. First Peoples Bank of New Jersey, John J. Master, Jr., Surtees MacKerchar & Janet Stewart to Crossclaim of Co-Deft. Thomas E. Sundstrom, filed |
| 10-28-80 | 12 | Affidavit of Cosmo A. Giovinazzi in opposition to Pltfs. motion filed |
| 11-7-80 | | Hearing on motion by Plaintiffs for an Order (1) extending time for Discovery; (2) granting Summary Judgment against Deft. Thomas Sundstrom and (3) attaching or impounding monies from sale of premises; Ordered (1) extending time for Discovery - Granted; (2) Reserved Decision as to granting Sum- |

| | | |
|---|---|---|
| | | mary Judgment against Deft. Thomas Sundstrom (3) Denying attaching or impounding monies from sale of premises; Order to be submitted (Gerry, J.) |
| 11-19-80 | 13 | Order to extend time for discovery 90 days, Filed, 11-18-80, (Gerry J) Notice mailed. |
| 11-19-80 | 14 | Order denying Pltfs. motion for attachment of monies from sale of premises, etc., Filed. 11-18-80. (Gerry J) Notice mailed. |
| 12-5-80 | 15 | Notice to take deposition of Thomas E. Sundstrom, et al., Filed. |
| 1-15-81 | 16 | Notice of motion by Plrf., for an Order to extend time for discovery, and to setaside default judgment, Filed 1-14-81 (Returnable 2-20) |
| 1-15-81 | 17 | Pltf's answer to Counterclaim, Filed 1-14-81. |
| 2-20-81 | | On return of motion by Plaintiffs for an Order to set aside default judgment, to file answer to counterclaim out of time, and to extend discovery; Oral Opinion rendered by the Court; Ordered Motion Denied, and filed Answer to Counterclaim - Strikened; Order to be submitted |
| 3-10-81 | 18 | Report and Recommendation of U.S. Magistrate, to Hon. John F. Gerry Filed 3-5-81..notice mailed. |
| 3-19-81 | 19 | Objections of Pltf., to Report of U.S. Magistrate, Filed. 3-18-81 |
| 3-19-81 | 20 | Order that Pltfs. motions are denied and this action be dismissed, with prejudice and without costs, Filed 3-16-81 (Gerry J) Notice mailed. |
| 4-22-81 | 21 | Deposition of Donald Sundstrom, taken 12-26-81, Filed. 4-3-81. |
| 5-7-81 | 22 | Deposition of James Sullivan taken on 12-9-80, Filed 5-5-81 |
| 5-81 | 23 | Notice of appeal, Filed 4-14-81 Record and notice mailed to clerk U.S.C.A. and all counsel. |
| 6-30-81 | 24 | Transcript of proceeding of 11-7-80, Filed. 6-26-81. |
| 6-30-81 | 25 | Transcript of proceedings of 2-20-81. Filed. 6-26-81. |
| 6-30-81 | | Supplemental record on appeal, Mailed to Clerk, U.S.C.A. |
| 8-20-81 | 26 | Transcript of hearing of 2-20-81, Filed. 8-14-81. |
| 8-21-81 | 27 | Transcript of hearing of 11-7-80, Filed. |
| 7-6-82 | 28 | Certified Copy of Order of U.S. Court of Appeals |

| | | |
|---|---|---|
| | | dismissing Appeal, without costs, filed (Gibbons, C.J.) |
| 10-21-82 | | Discovery Special Problems Held on 10-18-82 (Hammill) |
| 2-24-83 | 29 | Affidavit of James Sullivan, filed 2-23-83 |
| 4-19-83 | 30 | Certification of John J. Markwardt, in Opposition to Plaintiffs' Motion for Reinstatement of Complaint, filed |
| 4-21-83 | 31 | Certification of Cosmo A. Giovinazzi, III, in opposition to plaintiffs' motion for reinstatement of complaint filed. |
| 4-22-83 | 32 | Plaintiffs' motion for Reinstatement of plaintiff's Original complaint, filed. (ret. 6/17/83) per Maida. |
| 7-8-83 | | Ordered motion by plaintiff for an Order reinstating original complaint Denied; Ordered motion by plaintiff for partial Summary Judgment - Declared Moot; Order to be submitted. (J. Gerry) |
| 7-13-83 | 33 | Order denying plaintiff motion, reinstating original complaint, and that plaintiff's motion for partial Summary Judgment against deft. Thomas E. Sundstrom is Moot, etc. filed (Gerry) Notice Mailed |
| 7-14-83 | 34 | Order dismissing Counterclaims of defts. First Peoples Bank of N.J., John J. Master, Esq. and John J. Markwardt, Esquire without prejudice and without cost and dismissing Crossclaim of deft. Thomas E. Sundstrom with prejudice and without Costs. |
| 10-27-83 | 34 | Notice of Motion by Plaintiff for an Order to cure defect in Service of Process of Orders Entered under Rule 60(a), filed 10-25-83 (Ret. 11-18-83) W/ Affidavit of James and Helen Sullivan & Certification of Service thereto. |
| 11-9-83 | | Certification of John J. Markwardt in opposition to plaintiff's motion to cure defect in service of process of orders entered, filed 11-7-83 |
| 11-9-83 | 36 | Affidavit of Thomas E. Sundstrom, filed 11-7-83 |
| 11-14-83 | 37 | Certification of Cosmo A. Giovinazzi, III, in Opposition to plaintiff's motion to cure defect in service of process under Rule 60(a), filed 11-7-83 |
| 11-1-83 | | On return of motion by plaintiff for an order to cure |

| | | |
|---|---|---|
| | | defect in service or process, etc. Oral opinion rendered by the Court; Ordered motion denied. Order to be submitted. (Gerry) 11-18-83 |
| 11-21-83 | 38 | Order denying Plaintiff motion to cure defect in service or process etc. purs: to Rule 60(a), filed 11-12-83 (Gerry) Notice Mailed |
| 12-20-83 | 39 | NOTICE OF APPEAL of Plaintiffs filed. (9:30 A.M.) (Notices to Clerk, USCA; Mr. Sullivan; Messers Tuso, Gruccio, Pepper, Buonadonna, Giovinazzi & Butler; John J. Markwardt and Thomas E. Sundstrom) |
| 12-20-83 | 40 | Clerk's Certificate of Two Hundred Dollar ($200.00) Cash Deposit in lieu of Bond to secure an Appeal to USCA/3rd Circuit filed. |
| 1-10-84 | 41 | Transcript Purchase Order stating needed transcript already on file, filed. |
| 1-10-84 | | RECORD COMPLETE FOR PURPOSES OF APPEAL. (record-on-file to Clerk, USCA) |

## APPENDIX EE

## LETTER FROM JAMES SUNDSTROM SULLIVAN TO HONORABLE JOHN F. GERRY DATED DECEMBER 7, 1982

P.O. Box 634
Ocean City, N.J. 08226
609-399-8995

Honorable John F. Gerry
Judge of the U.S. District Court
United States Court House
Camden, N.J. 08101

Re: Sullivan et al v. 1st Peoples Bank of N.J.
C.A. # 80-1554

Dear Judge Gerry:

I am objecting to the form and content of the order submitted by counsel in dismissing their alleged counter-claims for malicious prosecution in the above matter on this basis. On the sixth line of order there is a clause which states that:

> ....., and that the dismissal of all counter-claims would terminate the entire action...

and such clause is not representative of the motion for summary judgment which was filed, along with supporting affidavits, and the cross claim of Thomas E. Sundstrom against these defendants, also with supporting affidavits. Since the Court was not active in disposing of these two items, and Thomas E. Sundstrom was not notified of any pre-trial hearing in January of 1981, nor involved with Judge Hammill's Report and Recommendation in March of 1981, these issues must be disposed of by the Court before the matter is ripe for appeal. I have already moved the Court with supporting papers for such motion for summary judgment; it should be incumbent upon the Court to follow through with its decision, so that an intelligent appeal can follow.

As in excess of one thousand dollars ($1,000.) was expended on the last appeal, I would appreciate avoiding another academic run. The order is otherwise not objected to in the other respects as to form and content.

Very truly yours,

cc: John J. Markwardt, Esq.
John J. Master, Jr., Esq.
Hon. James F. Hammill
Cosmo A. Giovanazzi, Esq.

s/J.S.S.
James Sundstrom Sullivan

JSS/fm

## APPENDIX FF

ORDER OF SETTLEMENT - CAPE MAY COUNTY COURT

CHARLES, STURM & MASTER
Attorneys and Counselors At Law
A Professional Corporation
610 Haddon Avenue
Collingswood, New Jersey 08108

Attorneys for First Peoples Bank of New Jersey

_____ CAPE MAY COUNTY COURT

IN THE MATTER OF THE ESTATE OF MARY V. SULLIVAN, DECEASED — PROBATE DIVISION

Docket No.

Civil Action

ORDER OF SETTLEMENT

This matter having come before the Cape May County Court, Probate Division, on July 27, 1978 upon the Complaint and Order to Show Cause directed to beneficiaries by the Plaintiff, First Peoples Bank of New Jersey, with John J. Master, Jr., of the firm of Charles, Sturm & Master, appearing on behalf of Plaintiff, and John J. Markwardt, Esquire, appearing on behalf of the beneficiary-exceptant, Donald Sundstrom and the beneficiary-exceptants, Harry Sundstrom, Thomas Sundstrom and James Sundstrom Sullivan, appearing **pro se**; and

Prior to the conclusion of the hearing on exceptions to Plaintiff's Accounting, certain matters having been amicably adjusted by and between the plaintiff-accountant and each of the exceptant-beneficiaries named above, with a stipulation of settlement having been placed on the record on July 27, 1978, whereby all parties consented to the terms and conditions of the settlement, and

It being the desire of the parties and the direction of the Court to include the terms and conditions of settlement as part of a formal Court Order of Settlement;

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The Accounting as submitted by Plaintiff is allowed.

2. The Plaintiff-corporate trustee shall not receive commissions through the date of its first Intermediate Accounting.

3. Plaintiff-corporate trustee shall deposit the sum of $3,000.00 to the individual trust of Donald Sundstrom, Harry Sundstrom and Thomas Sundstrom in satisfaction of claims of those respective beneficiaries to interest income, said amounts to be in full satisfaction of any claims with respect to the income accounting as submitted by plaintiff-corporate trustee and said amounts to be in satisfaction of any interest on principal of all trusts in this account through a date thirty (30) days from the date of this Order.

4. Within thirty (30) days from the date of this Order, plaintiff-corporate trustee shall transfer the following amounts to the individual trust of Donald Sundstrom, Harry Sundstrom and Thomas Sundstrom. The specified amount includes the deposit referenced in paragraph 3 of this Order:

   (a) Donald Sundstrom Trust - $3,098.88

   (b) Harry Sundstrom Trust - $15,920.40

   (c) Thomas Sundstrom Trust - $17,632.45

5. The vacant lot commonly known and designated as Block 245, Lot 141, Section F of the Tax Map of the City of Ocean City, shall be sold in the following manner:

   (a) The corporate trustee shall obtain a competent appraisal.

   (b) The corporate trustee shall list the property for sale as an "open listing" for an amount not less than the appraised value.

   (c) Any appraisal fees, brokers' commissions, realty transfer fees and any and all customary sellers' expenses for the transfer of ownership of property shall be paid from the proceeds of sale.

   (d) Each co-trustee-beneficiary shall fully cooperate with the corporate trustee to accomplish the sale and transfer of the designated Lot.

   (e) To the extent that the net proceeds from the sale of this property exceed the book value as set forth in

the accounting of plaintiff-corporate trustee as allowed that excess shall be allocated in one-fourth shares to the trusts of each individual co-trustee-beneficiary.

6. The lot and premises commonly known and designated as 50 Central Avenue, City of Ocean City shall be sold in the following manner:

(a) The individual co-trustee-beneficiaries, Donald Sundstrom, Harry Sundstrom and Thomas Sundstrom have stated their consent to the sale of the 50 Central Avenue property to the individual co-trustee-beneficiary, James Sundstrom Sullivan for a total cash purchase price of $25,000.00, provided the sale to James Sundstrom Sullivan takes place in the manner and within the time set forth in paragraphs 6(b) through 6(e).

(b) James Sundstrom Sullivan shall have until September 25, 1978 to obtain a firm commitment for financing the full purchase price of $25,000.00.

(c) In the event James Sundstrom Sullivan obtains a firm commitment for the full purchase price of $25,000.00, then settlement shall be scheduled on or before October 25, 1978.

(d) In the event of a sale of the property to James Sundstrom Sullivan any and all expenses to convey title to the property to James Sundstrom Sullivan shall be paid from the proceeds of sale.

(e) The premises shall be conveyed to James Sundstrom Sullivan in an "as is" condition as of date of settlement. There shall be no warranties and no representations as to the allowable use or permissible occupancy of the premises. The grantor shall not be required to determine or obtain the requirements whether state or local for actual use of the property.

(f) In the event that James Sundstrom Sullivan is unable to produce a firm commitment for the full purchase price of $25,000.00 on or before September 25,

1978, the corporate trustee and the individual co-trustee-beneficiaries shall proceed to liquidate the property in the same manner as indicated for Block 245, Lot 141 as referenced in paragraph 5 of this Order.

7. The Court allows counsel fees and expenses for accounting services to John J. Markwardt, Esquire of $5,000.00; the Court allows counsel fees to the firm of Charles, Sturm, & Master of $2,000.00 for services rendered through this action for approval of the first Intermediate Accounting.

8. The issues relating to the sale of certain property and reimbursement to the corporate trustee from the proceeds of the properties in the individual trusts of James D. Sullivan are severed with this Court retaining jurisdiction with respect to the resolution of those issues.

9. Any future relief for the parties with respect to the First Intermediate Accounting shall be pusuant to and limited by the terms of settlement as stated above and the terms of settlement shall take the place of all underlying causes of action between the parties.

s/N.C.S.
NATHAN C. STALLER, J.C.C.

TRUE COPY
CAPE MAY COUNTY SURROGATE

84-886

No. 84-886

SUPREME COURT, U.S.
FILED
JAN 4 1985
ALEXANDER L. STEVAS
CLERK

In The

# Supreme Court of the United States

OCTOBER TERM, 1984

JAMES SUNDSTROM SULLIVAN and
HELEN DAWSON SULLIVAN,
*Petitioners,*

*-vs-*

THE FIRST PEOPLES BANK OF NEW JERSEY,
THE MARY V. SULLIVAN TRUST FUND,
DONALD R. SUNDSTROM, Trustee,
HARRY F. SUNDSTROM, Deceased, Trustee,
JOHN J. MASTER, JR., ESQ., (A New Jersey Attorney
at Law), JANET STUART and SURTEES L.
MacKERCHAR, (Trust Officers of the First
Peoples Bank of New Jersey),
*Respondents.*

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI FOR ALL RESPONDENTS OTHER THAN THOMAS E. SUNDSTROM

GRUCCIO, PEPPER,
GIOVINAZZI, BUTLER,
DeSANTO & MANN, P.A.
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Attorneys for Respondents
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John J. Markwardt

*On the Brief*
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## PRELIMINARY STATEMENT

The Petitioners have filed a Petition for Certiorari in clear violation of the requirements of *Rule 21.1(j)* that same contain a direct and concise argument amplifying the reasons relied on for the allowance of the writ pursuant to the provisions of *Rule 17*. Instead, the Petitioners have made a rambling, inaccurate and misleading presentation of both the underlying facts and also the procedural history of the within matter which is a complete distortion of the events which underlie the present controversy.

The said Petition is also, to a great degree, a brief on the merits prior to the Court's granting the Petition for Writ of Certiorari. In order to comply with the requirements of *Rule 22.1*, the Respondents (except for Thomas E. Sundstrom) are jointly filing the within Brief in opposition to the Petition For Certiorari and limiting their arguments to the disclosure of those matters and grounds why the cause should not be reviewed by the Court pursuant to the provisions of *Rule 17*. In doing so, however, the Respondents do not in any way concede the merits advanced by the Petitioners in the guise of reasons relied on for the allowance of the Writ. The Respondents are also compelled to set forth a true statement of the case in order to correct the inaccuracies and omissions contained in the Statement of Facts provided by the Petitioners, as would be required in a brief on the merits pursuant to *Rule 34.2*.

## COUNTER-STATEMENT OF THE CASE

On or about August 29, 1978, the Probate Division of the Cape May County Court entered an Order pursuant to which a conveyance of a certain real property asset of a trust was to be made to the Petitioner James Sundstrom Sullivan ("Sullivan") for a sum certain and specifically conditional upon (1) his obtaining financing therefor by September 25, 1978 and (2) settlement taking place by October 25, 1978. (152a). The Order specifically provided that in the event that Sullivan was unable to produce a firm commitment for the full purchase price by the said date, the other trustees were to proceed to liquidate the said property in a stipulated manner. Sullivan was, in fact, unable to procure the required commitment or make settlement by the dates so fixed and, ultimately, on December 8, 1978, the Court stated that it was once again and **for the last time** granting an extension to Sullivan to make settlement by December 22, by his tender of the full amount of $25,000.00 in cash and in exchange for a deed.

On December 11, 1978, Sullivan wrote to his three brothers, the co-trustees of the estate, and advised them that he had received a title report which, he concluded, established that title to the subject property was not vested in the trust estate but was, in fact, vested either jointly in the trust fund and the Respondent Donald R. Sundstrom ("Donald") or solely in Donald. It should be noted that Sullivan has apparently had both some formal legal training and also extensive past and contemporaneous experience as a **pro se** litigant. In his communications with his brothers, therefore, Sullivan clearly attempted to speak with authority in regard to his legal conclusions and he stated that he did not see how title could pass on December 22, 1978.

On December 12, 1978, Sullivan wrote Donald and advised him that the title report had shown Donald to be the owner of the subject premises. He further stated that he would inform Donald "as to the new settlement date" and indicated his intention to insure the title with another title company which "will not know of the existence of the Mary V. Sullivan Trust Fund".

Shortly thereafter, Sullivan sent to Donald a deed which he had prepared and correspondence which stated that he would not inform the Court of the transaction until after same had taken place. He fur-

ther stated that he could not obtain a second mortgage on the subject property, until a first mortgage had "gone through", because the prospective first mortgagee wanted a first lien with no other incumbrances.

The aforesaid communications were directed by Sullivan to his brothers without any notice of same being given to the Respondent John J. Markwardt, Esq. ("Markwardt"), who had been representing Donald in connection with the trust proceedings, to the Respondent corporate trustee, The First Peoples Bank of New Jersey ("The Bank"), or to its attorney, the Respondent John J. Master, Jr., Esq. ("Master"), who had been representing the corporate trustee in connection with the trust proceedings.

Fortunately, Donald reported the said communications to his attorney, and thereafter Sullivan confirmed his position regarding settlement with said attorney. On December 22, 1978, for example, Sullivan wrote to Markwardt, and advised that his "second title report" showed conclusively that Donald owned the subject property. Sullivan felt that the original Court Order of settlement would have to be vacated and discussed whether the Motion to so vacate the Order would be brought by Donald or by Sullivan. On December 18, 1978, Sullivan wrote to the Court and advised of his conclusion that the subject property was not a part of the trust estate, and stated that "there is a cloud on the title if the corporate trustee attempts to pass title by virtue of the Mary V. Sullivan Trust instrument". Sullivan also advised the Bank, through Master, of his conclusions and position by letter dated December 27, 1978.

As a result of subsequent investigation, however, it became apparent that the title to the subject property was, in fact, vested in the trust and that Donald had no individual interest in same. Since the previously-fixed time deadlines which had been established by Court Order, as extended, had expired, the parties applied to the Court for directions. By Order dated April 23, 1979, the Court granted to Sullivan a further extension to make settlement by May 18, 1979, upon his specific representation that he still had a mortgage commitment in an amount not less than that previously required by Court Order. Sullivan scheduled the settlement to take place on May 16, 1979 but, at the appointed time and place, neither Sullivan nor the Respondent Thomas E. Sundstrom ("Thomas") appeared; however, by that date, a deed had been executed by the Bank by the Respon-

dent Harry F. Sundstrom ("Harry") and by Donald. Donald, Markwardt, and Master all appeared at the place scheduled for settlement by Sullivan.

On May 21, 1979, the Court ordered that a deed signed by trustees other than Thomas and Sullivan would be valid and sufficient to convey title to the subject property. Both that Order, and previous Orders, were challenged by Sullivan and after a full hearing, the Court ordered, on November 16, 1979, that any deed executed by the Bank would be valid and sufficient to convey title to the subject property. Sullivan applied for a stay of that Order and, on February 6, 1980, that application was denied by the Appellate Division of the Superior Court of New Jersey. Sullivan failed to prosecute his appeal of that Order in the Appellate Division, and his appeal was dismissed for lack of prosecution. (See Pa 20-3). On or about May 29, 1980, the Petitioners filed the within action in the Federal District Court against the Respondents.

The aforesaid statement of the case has been presented in order to evidence the malicious, false and misleading manner in which the Petitioners have prosecuted this action from its very inception. In their Statement of Facts, the Petitioners allege that Donald and Markwardt refused to go to settlement on December 22, 1978. As clearly set forth above, however, it was Sullivan himself who refused to proceed with settlement because he had procured a title report which, he concluded, had shown that title to the subject property was vested in Donald. He then attempted to procure title to the subject property from Donald and without regard for the specific directions of the previously-entered Court Order. He drafted a deed and submitted same to Donald for execution and he proposed to obtain title insurance from a title company not cognizant of the trust fund. Finally, he attempted to accomplish his goals by circumventing the attorney of record for Donald.

It is clear that Sullivan was never ready, willing, or able to engage in a settlement on or before December 22, 1978 and, in fact, had manifested his intention not to participate in settlement by such time. Thus, his statement to this Court that certain of the Respondents refused to go to settlement on December 22, 1978 is an outrageous falsehood which is clearly designed to mislead the Court in its review of the Petition.

On March 16, 1981, the United States District Court dismissed the Petitioners' Complaint with prejudice. (Pa 25). The Petitioners' appeal of this Order was dismissed due to the fact that there remained undisposed in the District Court certain counterclaims and a crossclaim filed by various Respondents. (Pa 26). Upon the matter being remanded to the District Court, two pre-trial conferences were held and, upon agreement of the parties, an Order was submitted which provided for the dismissal of the outstanding counterclaims and crossclaim. The Petitioners thereafter advised the Court that they had no objection to the form and content of this Order and acknowledged their understanding that the matter would thereby be concluded on the trial level. In their Statement of the Facts, however, the Petitioners claim that they objected to this form of Order because it did not include the crossclaim of Thomas.

This statement is also completely and totally false. On March 17, 1983, Sullivan wrote to the Federal Magistrate and stated that "I see no objection from the Plaintiff's and as to the form and content of the Order submitted by Mr. Markwardt". In fact, a copy of this letter was annexed by the Petitioners as Exhibit PA 277 in the Appendix which they filed with the United States Court of Appeals for the Third Circuit.

Shortly after stating their lack of objection to the said Order of dismissal and apparently as a result of their becoming disgruntled with certain State Court proceedings, the Petitioners filed a motion in the District Court for reinstatement of their Complaint. The motion was ultimately made returnable on July 8, 1983 and the Petitioners were directed by the Court to promptly determine the disposition of their application. A copy of the Court's Notice was annexed as Exhibit PA 318 in the Appendix filed with the Third Circuit. On July 13, 1983, the Court entered an Order denying the plaintiffs' motion (Pa 29) and on July 14, 1983, the Court entered the Order dismissing the outstanding counterclaims and crossclaim, said Order specifically reciting therein that the dismissal of same would terminate the entire action. (Pa 30).

In their Statement of the Facts, the Petitioners assert that in approximately mid-September, 1983, they contacted the Clerk of the Court who informed them "that the file was in Trenton, and was in the dead files there"; however, the Petitioners have already sworn in an affidavit annexed as Exhibit PA 302 in the Appendix filed with

the Third Circuit that they did not call the Court to ascertain the disposition of their motion until approximately mid-October, 1983. By that time, of course, the Petitioners' right to appeal, if any, had expired on approximately August 13, 1983. Recognizing their dilemma, the Petitioners attempted to renew the previously entered order for the purpose of appealing therefrom, and filed a motion purportedly "to cure defect in service of process" contending therein that the Clerk had failed to serve them with copies of the said Orders. This motion was opposed by the Respondents and, on November 21, 1983, the District Court rejected this patently frivolous argument and entered an Order denying the motion. (Pa 32).

On December 20, 1983, the Petitioners attempted to appeal the Orders dated March 5, 1981, July 13, 1983, and November 21, 1983. On April 19, 1984, the United States Court of Appeals for the Third Circuit entered an Order which limited the appeal to the issues presented in the District Court's Order of November 21, 1983, since the time within which to appeal the previous Orders had long since expired. (Pa 33-36).

By Judgment dated September 4, 1984, the November 21, 1983 Order of the District Court was affirmed. (Pa 44).

## MATTERS AND GROUNDS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

### POINT I

### AN ORDER ENFORCING SETTLEMENT, INCLUDING A DISMISSAL OF THIS ACTION, HAS BEEN ENTERED IN AND AFFIRMED BY THE STATE COURTS.

On or about February 17, 1983, Sullivan entered into a stipulation of settlement which was placed upon the record in the New Jersey Superior Court. Pursuant to the terms of that settlement, Sullivan bargained for and accepted certain consideration from the Respondent Bank including the abandonment of certain claims against Sullivan, the payment of $15,000.00 to his children's trust, the assignment to him of shares of stock, and additional enumerated consideration. In return, Sullivan expressly stipulated that this federal court action would be dismissed with prejudice.

Sullivan's later attempt to repudiate this settlement was rejected by the Superior Court which entered an Order, on May 16, 1983, which enforced the terms of the settlement as if same had been signed by the Petitioners. The Appellate Division of the Superior Court has unanimously affirmed this Order and the New Jersey Supreme Court has declined to review same.

The Petitioners totally failed to disclose the foregoing facts to the District Court, to the Court of Appeals, and to this Court and this stipulation, and the Petitioners concealment thereof, constitute ample grounds why this cause should not be reviewed by this Court.

## POINT II

## THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR THE COURT TO GRANT A WRIT OF CERTIORARI.

Pursuant to *Rule 17.1*, a review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Although neither controlling nor fully measuring the Court's discretion, the character of the reasons which will be considered are set forth in *Rule 17.1(a)*, *(b)*, and *(c)*. The Petition for Certiorari contains no claims whatsoever relating to either a conflict of decisions between and among federal courts of appeals and state courts of last resort. The Petition also fails to claim that the decision of the Third Circuit Court of Appeals involves an important question of Federal Law which has not been, but should be, settled by the Supreme Court or that said decision has decided a federal question in a way in conflict with the applicable decisions of the Supreme Court. It is also abundantly clear that the Third Circuit Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

In its memorandum opinion of August 24, 1984 (Pa 41), the Third Circuit Court of Appeals ruled that the Petitioners' claim for relief under *F.R.C.P. 60(a)* due to the alleged failure of the District Court Clerk to give Petitioners notice of the entry of prior Orders was specifically precluded by the express provisions of *F.R.C.P. 77(d)*. It is respectfully submitted that this decision by the Third Circuit is in complete accord with the accepted and usual course of judicial proceedings in the application of *F.R.C.P. 77(d)* so as to preclude an untimely appeal by a party even if that party had not received notice of the entry of the disputed Order.

> *F.R.C.P. 77(d)* provides as follows:
> **Notice of Orders or Judgments.** Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in *Rule 5* upon each party who is not in default for failure to appear, and shall make a note in the docket mailing. Such mailing is sufficient notice for all purposes for which notice

> of the entry of an Order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in *Rule 5* for the service of papers. **Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed,** except as permitted in *Rule 4(a)* of the Federal Rules of Appellate Procedure. (Emphasis supplied).

An untimely appeal would not be permitted, in this case, under *F.R.A.P. 4(a)*, which provides that an appeal must be taken within thirty (30) days from the date of the entry of the Order appealed from. Subsection (5) of that Rule permits, upon the showing of excusable neglect for good cause, an application to the District Court for an Order extending time for filing if such Motion is filed not later than thirty (30) days after the expiration of the time otherwise prescribed; i.e., in this case, on or before approximately September 12, 1983. The Rule specifically prohibits any other extensions.

Obviously, by the time the Petitioners found it convenient to check into the disposition of their motion, in excess of three months after its scheduled hearing date, they were already too late to file a motion for extension of time. At the time of the bringing of their motion, they had been directed by the Court to determine the outcome of same. Therefore, they employed *F.R.C.P. 60(a)* as an improper device to file an untimely appeal from the previously-entered Orders. Both the District Court and Third Circuit Court of Appeals rejected this subterfuge.

The Court of Appeals decision is clearly dictated by the applicable rules and is not a departure from the accepted and usual course of judicial proceedings.

> Thus according to the terms of *Rule 77(d)*, failure of the Clerk to send notice of the entry of judgment as required by the rule does not toll the running of the time for appeal under *Rule 4(a)* of the *F.R.A.P*, nor, of itself, require that the Court grant an extension of time under that provision. When in the ordinarily civil case, in which the United States is not a party, 60 days have elasped since the entry of judgment, there can be no appeal despite the fact that the Clerk did not comply with *Rule 77(d)* and

> the party in fact did not learn of the entry of judgment until the 60 days had run. *Moore, Federal Practice, Vol. 7, 77.05. (1973).*

A circumstance similar to that presented here was considered by the Court in *Weedon v. Gaden, 419 F.2d 303 (D.C. Cir. 1969).* In that case, the order sought to be appealed was entered on November 17, 1967. Neither party received a notice of the entry of the order from the clerk. On January 19, 1968, the prospective appellants' attorney discovered that the order had been entered and filed a motion to vacate same. That motion was denied on February 13, 1968 and, on March 18, 1968, a notice of appeal therefrom was filed. The Court held:

> Only one notice of appeal has been filed in this litigation, and that on March 18, 1968, directed to the Court's action on February 13, 1968, and not the order of November 17, 1967. Even if the notice of appeal could nonetheless be deemed to embrace that order -- a dubious proposition, but one we need not consider -- the appeal from that order would be fatally untimely.
>
> Civil appeals between private parties from a District Court to a Court of Appeals must be taken by the filing of a notice of appeal within 30 days from the entry of the judgment appealed from. The time period is jurisdictional; and the scant provision for its enlargement, even had it been invoked here, would not accommodate the instant problems. By any measure, appellant's notice of appeal came too late to bring the order of November 17, 1967, before us for review.
>
> In so concluding, we have not overlooked the fact that appellants' counsel did not receive notice of the entry of that order, and did not find out about it until it was too late to file a timely notice of appeal. That unfortunate circumstance cannot be attributed to appellee, for while, had he known of the order, he might have served a notice of its entry, he was under no compulsion to do so, moreover, appellee's counsel did not get notice either. *Id. at 307.*

The Court concluded that *F.R.C.P. 77(d)* explicitly provided that lack of notice of the entry of the order by the clerk did not affect

the time to appeal and, therefore, the order of the District Court was affirmed. A similar result was reached in *Lathrop v. Oklahoma City Housing Authority, 438 F.2d 914 (10th Cir. 1971), cert. den. 404 U.S. 840 (1971),* wherein the prospective appellants did not learn of an August 15, 1969 order until January 28, 1970. See also, *Mashak v. Hacker, 297 F.2d 495 (7th Cir. 1961); Lord v. Helmandollar, 348 F.2d 780 (D.C. Cir. 1965) cert. den. 383 U.S. 928 (1966).*

Finally, in *Long v. Emery, 383 F.2d 392 (10th Cir. 1967),* the plaintiff had received notice of a hearing of motions to amend and modify a judgment. The plaintiff chose not to attend the hearing and did not receive notice of the order entered as a result thereof until the expiration of 30 days thereafter. The plaintiff then moved for an extension of time to file a notice of appeal under former *Rule 73(a).* The District Court denied the motion and the Court of Appeals, affirming the denial, noted:

> *Rule 77(d),* as amended, thus plainly charges the prospective appellant with the duty of following the progress of the action and advising himself when the court makes the order he wishes to protest. *Id. at 394.*

It is also clear that there never existed a basis for relief under *F.R.C.P. 60(a).* The so-called "clerical mistake" alleged by the Petitioners was the District Court Clerk's claimed failure to forward copies of the entered Orders to the Petitioners. The language of *F.R.C.P. 60(a)* unambiguously refers to clerical mistakes **in** an Order and errors **therein** arising from oversight or omission. Certainly, the Petitioners do not claim that the entered Orders contained errors which require correction.

It is clear that *F.R.C.P. 60(a)* relates primarily to mistakes which do not really attack the party's fundamental right to the judgment at the time it was entered and that said Rule permits, for example, reasonable additions to the record. *United States v. Stuart, 392 F.2d 60, 62 (3rd Cir. 1968).* It is well settled that this Rule applies only to an error of transcription, copying, or calculation, and not to a fundamental failure of discovery or notification. *Bershad v. McDonough, 469 F.2d 1333, 1336 (7th Cir. 1972).* Thus, the Rule has been invoked to add allowable pre-judgment interest to a judgment, to correct the calculation of the amount of a judgment, and to assess costs. See, respectively, *Glick v. White Motor Company,*

*458 F.2d 1287 (3rd Cir. 1972); Trujillo v. Longhorn Mfg. Co., Inc., 694 F.2d 221 (10th Cir. 1982);* and *Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982).* The Rule may not be invoked, however, with respect to errors that affect substantial rights of the parties. *Warner v. City of Bay St. Louis, 526 F.2d 1211 (5th Cir. 1976).*

*F.R.C.P. 60(a)* has never been invoked to correct an alleged clerical error consisting of the Clerk's failure to give notice of the entry of an Order or Judgment. See *Moore, Federal Practice, Vol. 6A, 60.05-60.08 (1973).* The fact that a Clerk may fail to give notice of the entry of an Order is specifically covered by *F.R.C.P. 77(d)* which has been discussed at length above.

The Third Circuit Court of Appeal's affirmance of the District Court's denial of relief under *F.R.C.P. 60(a)* was, therefore, in accordance with the accepted and usual course of judicial proceedings as traditionally followed by those Courts adhering to the Federal Rules of Civil Procedure.

Since it is clear that *F.R.C.P. 60(a)* does not apply to an alleged failure of the District Court Clerk to give notice of the entries of the July, 1983 Orders and since, in any event and under *F.R.C.P. 77(d),* such a situation would not affect the Petitioners' time to appeal or relieve or authorize a Court to relieve them for failure to appeal within the time allowed, it is quite clear that, as a matter of law, the acts and omissions of the Petitioners themselves have precluded, and now preclude, the consideration of any Order other than that denying their claim for relief under *F.R.C.P. 60(a).* Thus the "Questions Presented" outlined in the Petition which relate to issues other than a claim for relief under *F.R.C.P. 60(a)* were not timely brought on appeal to or considered by the Third Circuit Court of Appeals, are not within the jurisdiction of this Court on a Petition for Writ of Certiorari, and cannot constitute special and important reasons for this Court to grant a Writ of Certiorari; i.e., only Question Three (3) considers, and obliquely at that, the Petitioners' claim for relief under *F.R.C.P. 60(a).*

## POINT III

### THE PETITIONERS HAVE PRESENTED QUESTIONS NOT PROPERLY RAISED BEFORE THE THIRD CIRCUIT COURT OF APPEALS IN THIS MATTER.

Under Questions Two and Five of the Petition, the Petitioners raise the applicability of certain local rules for the United States District Court for the District of New Jersey. In filing a sixty-five page appellate brief with the Third Circuit Court of Appeals, the Appellants never raised the applicability of any of the said local rules. Their only mention of same was restricted to *local Rule 12(c)* and that was set forth in a brief filed in opposition to a motion to dismiss the appeal. The Petitioners never amended their appellate brief to cite or rely upon any local rules but, rather, improperly attempted to assert same in a brief submitted in reply to the Respondents' brief.

Therefore, any asserted violation of said local rules in Question Two (2) and Five (5) is improper and outside the scope of the issues placed before the Third Circuit Court of Appeals and cannot constitute the grounds for special and important reasons for the grant of a Writ of Certiorari in this matter. It should also be noted, however, that Question Five (5) alleges that opposing counsel violated certain rules of service as set forth in the local rules; yet under the said rule, the prevailing party is required to **submit** (not serve) an Order only upon direction of the Court (Pa 54) and, in this case, no such direction to the prevailing parties was ever made by the Court. It is patently clear, therefore, that, even were this issue properly before this Court, and it is not, it would be determined that opposing counsel did not violate any rule relating to submission of an order and, in any event, the cited rule does not impose an obligation on the part of opposing counsel to serve an executed order.

## POINT IV

### THE PETITIONERS HAVE NO STANDING TO RAISE QUESTIONS CONCERNING THE DISMISSAL OF THE CROSSCLAIM OF THOMAS E. SUNDSTROM.

In Question Four (4) the Petitioners raise a question concerning the dismissal of the crossclaim of one Thomas E. Sundstrom. The Petitioners obviously have no standing to raise questions concerning such dismissal and Thomas himself did not timely appeal same to the Third Circuit Court of Appeals.

It should be noted, however, that, in the Order of Dismissal (Pa 31), the District Court recited the Petitioners' own filing of an affidavit which averred that Thomas was aware of but chose not to participate in a pre-trial conference and that Thomas had not participated at all in the litigation for a period of almost three years. He had, in fact, moved to Alaska.

Finally, it should also be emphasized that this dismissal was contained in the form of order to which the Petitioners had previously advised the Court that they had no objection.

## POINT V

### WITH RESPECT TO QUESTION THREE (3) THE PETITIONERS HAVE NOT TIMELY PETITIONED FOR CERTIORARI RELATIVE TO THE CHALLENGED ORDER.

In Question Three (3) the Petitioners allege that the Court of Appeals erred in limiting the present appeal to the Petitioner's claim for relief under *F.R.C.P. 60(a)*. the Court of Appeals rendered that decision on April 19, 1984.

Pursuant to *28 U.S.C. 2101(c)*, any Writ of Certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or decree. A Justice of the Supreme Court, for good cause shown, may extend a time for applying for a Writ of Certiorari for a period not exceeding 60 days.

The Petitioners filed their Petition for Certiorari on or about December 1, 1984, approximately 225 days after the entry of the Order to which the Petitioners now ascribe error. As previously set forth, the Court of Appeals decision in this regard was, in any event, clearly correct and in accordance with the accepted and usual course of judicial proceedings; however, the Petitioners are untimely in now seeking a Writ of Certiorari relative to same.

## CONCLUSION

From the foregoing, it is quite clear that this cause should not be reviewed by the United States Supreme Court. Despite the transparently meritless attempt by the Petitioners to raise a constitutional issue relating to a right of trial by jury, it is obvious that the complaint was dismissed due to their own continuous disregard of prescribed Court rules and procedures. The fact that their complaint demanded a trial by jury is merely incidental to that plain fact.

The Respondents have had great difficulty in responding to the Petition because it has not presented with accuracy, brevity and clearness those points which are essential to a ready and adequate understanding of the points requiring consideration. Therefore, the Petition should be denied for that reason pursuant to *Rule 21.5.*

Finally, the Petitioners have clearly presented a false and misleading statement of the case, as heretofore discussed and have continued to maliciously prosecute a baseless action against these Respondents who respectfully request that the Court deny the Petition for Certiorari and allow costs to the Respondents.

Respectfully submitted,

s/J.J.M.
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